OFFICE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1959~~ 1960

No. ~~409~~ 7

BRUCE BOYNTON, PETITIONER,

vs.

VIRGINIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

PETITION FOR CERTIORARI FILED SEPTEMBER 15, 1959

CERTIORARI GRANTED FEBRUARY 23, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1959~~ 1960

No. ~~409~~ 7

BRUCE BOYNTON, PETITIONER,

vs.

VIRGINIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

INDEX

	Original	Print
Record from the Police Court of the City of Richmond, Commonwealth of Virginia		
Warrant and certificate of conviction	1	1
Record from the Hustings Court of the City of Richmond	3	4
Notice of tender of transcript of evidence and for certification thereof	3	4
Notice of appeal and assignments of error	4	5
Motion to dismiss warrant	6	6
Minute entry of hearing	7	7
Stipulation of facts and attachments	8	8
Attachment — Lease between Trailways Bus Terminal, Inc. and Bus Terminal Restaurant of Richmond, Inc., dated December 2, 1953	10	9
Attachment — Transcript of trial proceedings held in the Police Court of the City of Richmond, dated January 6, 1959	20	19
Appearances	20	19

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MARCH 31, 1960

	Original	Print
Record from the Hustings Court of the City of Richmond—Continued		
Stipulation of facts and attachments—Continued		
Attachment — Transcript of trial proceedings held in the Police Court of the City of Richmond, dated January 6, 1959—Continued		
Testimony of Stanley Sylvanius Rush—		
direct	21	20
cross	24	21
Russell Forest Stout—		
direct	30	25
cross	31	26
redirect	31	26
recross	32	26
Bruce Boynton—		
direct	32	27
cross	37	30
Judgment	39	30
Order overruling motion to dismiss warrant and suspending execution of sentence	40	31
Order re transcript	41	32
Certification to transcript (omitted in printing)	42	32
Proceedings in the Supreme Court of Appeals of the Commonwealth of Virginia	43	32
Order refusing writ of error	43	32
Order staying execution and enforcement of judgment	44	33
Clerk's certificate (omitted)	45	33
Order allowing certiorari	46	34

[fol. 1]

IN POLICE COURT OF THE CITY OF RICHMOND, COMMONWEALTH OF VIRGINIA

WARRANT AND CERTIFICATE OF CONVICTION

No. 26717

COMMONWEALTH OF VIRGINIA
City of Richmond } To-Wit:

TO ANY POLICE OFFICER:

WHEREAS, STANLEY S. RUSH has this day made complaint and information on oath, before me, the undersigned, a Justice of the Peace of said city, that Bruce Boyington did on the 20 day of Dec., 1958. CM-21
Unlawfully trespass upon the premises at Trailway Bus Terminal, 9th and Broad Streets

These are, therefore, to command you, in the name of the Commonwealth, to apprehend and bring before the Police Court of the City of Richmond, the body of the above accused, to answer the said complaint and to be further dealt with according to law. And you are also directed to summon

√ Stanley S. Rush Address, Trailways Bus Terminal
as witnesses.

Given under my hand and seal, this 20 day of Dec., 1958.

Jno. McKenney (Seal)
Justice of the Peace

Amended Charge:

Unlawfully did remain on the premises of the Bus Terminal Restaurant of Richmond, Inc. after having been forbidden to do so by S. S. Rush, Assistant Manager of the said Bus Terminal Restaurant of Richmond, Inc., the said S. S. Rush being then and there lawfully in charge of said premises, there situate in the said City of Richmond

[fol. 2]

$300 bond
J. F. Mc

Docket No. 7083

COMMONWEALTH

WARRANT OF ARREST

CM 21

vs.

BRUCE BOYINGTON

Salman, Alabama

Executed this, the 20 day of December, 1958 by arresting the within named party, and by summoning the within named witnesses to appear in Police Court, December 22, 1958.

R. F. Stout

Upon examination of the within charge, I find the accused

Con 1/6/59

Guilty

Fined $10.00 & $6.25 costs

HAROLD C. MAURICE
Judge, Police Court

Stamp—Jan. 6, 1959

STATISTICS

Place of birth .....

Age ..... Color ..... Sex .....

Married ☐ Single ☐ Divorced ☐

Read ☐ Write ☐

Occupation .....

COSTS

Warrant	$ 1.50
Trial	2.00
Bail	
Arrest	1.00
Clerk, Htg. Ct.	1.25
Issuing, Search War.	
Serving Search War.	
Witness Attendance	.50
Commonwealth Atty.	
Total Costs	$ 6.25
Fine	10.00
Total	$16.25

IN POLICE JUSTICE'S COURT CITY OF RICHMOND

January 6, 1959

This is to certify that the within named Bruce Boynton, was this day tried by me for the charge set forth within this warrant, and that upon said trial he the said party was duly convicted of the within charge, and sentenced to pay a fine of $10.00 dollars, and costs $6.25 dollars, from which sentence he the said party appeals to the next term of Hustings Court.

Given under my hand this 6 day of January 1959.

HAROLD C. MAURICE, Police Justice.

[fol. 3]

IN THE HUSTINGS COURT OF THE CITY OF RICHMOND

COMMONWEALTH OF VIRGINIA,

v.

BRUCE BOYNTON.

To: T. Gray Hadden, Attorney for Commonwealth.

NOTICE OF TENDER OF TRANSCRIPT OF EVIDENCE AND FOR CERTIFICATION THEREOF

You are hereby notified that on the 8th day of April, 1959, at 9:30 o'clock A. M., or as soon thereafter as may be heard, in the Chambers of Honorable W. Moscoe Huntley, Judge of Hustings Court of City of Richmond, Virginia, the undersigned will tender the original transcript of the evidence, reduced to writing, in the above styled cause and respectfully ask the said Judge to certify the same as a true copy of the evidence in the above styled cause.

Bruce Boynton, By Martin A. Martin, Of Counsel for Appellant.

Martin A. Martin, Esquire, Clarence W. Newsome, Esq., 118 East Leigh Street, Richmond 19, Virginia, Attorneys for Appellant.

I accept due and timely service of the above notice.

T. Gray Hadden, Attorney for the Commonwealth.

[fol. 4]:

IN THE HUSTINGS COURT OF THE CITY OF RICHMOND

[Title omitted]

To: Thomas R. Miller, Clerk of Said Court:

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR—Filed April 7, 1959

Notice of Appeal

Notice is hereby given that Bruce Boynton appeals in this case and will apply for a writ of error and supersedeas.

Assignments of Error

The following are the errors assigned:

1. The court erred in refusing to strike the Commonwealth's evidence and dismiss this prosecution on the ground that the defendant was an interstate passenger traveling in interstate commerce and the local segregation rules and regulations of the carrier were not applicable to defendant and were no basis for the prosecution.

2. The court erred in refusing to strike the evidence and dismiss the prosecution in that the statute as applied in this case discriminated against defendant on account of his race and color and denied him the equal protection of the laws.

3. The court erred in holding that defendant violated the statute by violating the rules and regulations of the restaurant company since such rules and regulations denied the defendant due process of law and the equal protection of the laws.

4. The court erred in refusing to dismiss the prosecution on the ground that the statute as applied unconstitutionally attempts to regulate commerce.

[fol. 5] 5. The Court erred in refusing to dismiss the prosecution on the ground that the statute is an unconstitu-

tional and unlawful delegation of state police power to the restaurant company.

Bruce Boynton, By Martin A. Martin, Of Counsel.

April 7, 1959,

Service Accepted:

T. Gray Hadden, Attorney for the Commonwealth.

[fol. 6]

IN THE HUSTINGS COURT OF THE CITY OF RICHMOND

[Title omitted]

MOTION TO DISMISS WARRANT

Defendant moves the Court to dismiss the warrant issued against him for the following reasons:

1. Defendant, on the date of the warrant, was an interstate passenger and was in the restaurant operated by the carrier's lessee for the carrier's passengers and others. The statute as applied contravened his rights under the Interstate Commerce Clause to the Constitution and under the Interstate Commerce Act.

2. The said restaurant was an integral part of the bus service for its passengers traveling in interstate commerce, and the statute as applied to defendant in this case discriminates against him on account of his race and color, and denies him the equal protection of the laws.

3. In enforcing the custom or rules and regulations of the restaurant against this defendant on account of his race and color, the State denies this defendant due process of law and the equal protection of the laws under the Constitution of the United States.

4. The statute as applied is unconstitutional as it attempts to regulate the interstate commerce contrary to the Constitution and Laws of the United States.

5. The statute is unconstitutional as an unlawful delegation of State Police Power to the restaurant company.

Bruce Boynton, Defendant, By Martin A. Martin, Counsel.

Martin A. Martin, Esq., 118 East Leigh Street, Richmond 19, Virginia, Attorney for Defendant.

[fol. 7]

IN THE HUSTINGS COURT OF THE CITY OF RICHMOND

MINUTE ENTRY OF HEARING—February 4, 1959

Be it remembered that heretofore, to-wit; in the Police Court of this City the defendant was convicted as charged in the foregoing warrant, which conviction was appealed to this Court, and at a Hustings Court held for the City of Richmond, at the Courthouse, on the 4th day of February, 1959, the following order was entered:

Appeal.

COMMONWEALTH

vs

BRUCE BOYINGTON, Dft.

The said defendant this day appeared and was set to the bar in the custody of the Sergeant of this City and being arraigned pleaded not guilty to unlawfully remaining on the premises of the Bus Terminal Restaurant of Richmond, Inc., after having been forbidden to do so by S. S. Rush, Assistant Manager of the Bus Terminal Restaurant of Richmond, Inc., the said S. S. Rush being then and there lawfully in charge of said premises, there situate in the said City of Richmond, as charged. And with the consent of the accused, given in person, and the concurrence of the Court and the Attorney for the Commonwealth, the Court proceeded to hear and determine this case without a jury. And it being agreed to submit the case to the Court on the stenographic record of the evidence heard in the Police Court of this City, the Court doth continue this case to February 20, 1959, at 2:30 P. M. to hear argument of counsel. And thereupon the said defendant is released on continuing bail.

[fol. 8]

IN THE HUSTINGS COURT OF THE CITY OF RICHMOND

[Title omitted]

STIPULATION OF FACTS AND ATTACHMENTS

It is hereby stipulated and agreed by and between the Commonwealth of Virginia and Bruce Boynton, by their respective attorneys, as follows:

1. Stanley Sylvanius Rush, Russell Forest Stout, and Bruce Boynton if called and sworn as witnesses would give the same testimony which they gave at the hearing in Police Court on January 6, 1959, a transcript of which hearing is attached hereto and made a part hereof.

2. On December 20, 1958, the date of the offense charged in the warrant, there was no enforced racial segregation, by law or otherwise, in any of the facilities of the Trailways Bus Terminal, Ninth and Broad Streets, Richmond, Virginia, other than in the restaurant adjacent to said facilities and in the same building. The attorney for the Commonwealth objects to the admissibility of the facts stated in this paragraph on the grounds that they are immaterial [fol. 9] and irrelevant to the issues of the case.

3. Attached hereto is a true and correct copy of the lease in force and effect between Trailways Bus Terminal, Inc., and Bus Terminal Restaurant of Richmond, Inc., on December 20, 1958, the date of the offense charged in the warrant; and the Bus Terminal Restaurant of Richmond, Inc., was operating under said lease at said time. The defendant, by counsel, objects to the admissibility of the facts stated in this paragraph on the grounds that they are immaterial and irrelevant to the issues of the case.

Commonwealth of Virginia, By T. Gray Hadden, Attorney for the Commonwealth.

Bruce Boynton, By Martin A. Martin, Counsel for the Defendant.

[fol. 10]

ATTACHMENT TO STIPULATION—LEASE BETWEEN TRAILWAYS BUS TERMINAL, INC., AND BUS TERMINAL RESTAURANT OF RICHMOND, INC., DATED DECEMBER 2, 1953

This Agreement, made and entered into this 2nd day of December, 1953, by and between Trailways Bus Terminal, Inc., a Virginia corporation with its principal offices in the City of Richmond, Virginia, party of the first part, hereinafter called "Lessor", and Bus Terminal Restaurant of Richmond, Inc., a Virginia corporation with its principal offices in Norfolk, Virginia, party of the second part, hereinafter called "Lessee".

WITNESSETH:

That Whereas, Lessor is constructing a bus station in the City of Richmond, Virginia, on the premises located at the Northwest corner of Broad and Ninth Streets; and

Whereas, there is contained in said bus station facilities for the operation of a restaurant, soda fountain, and news stand; and

Whereas, Lessee desires to lease from Lessor facilities for the operation of the restaurant, soda fountain, and news stand, hereinafter fully described, for the term and upon the terms and conditions hereinafter specifically set forth;

Now, Therefore, This Agreement Witnesseth: That the parties hereto do mutually covenant and agree as follows:

LESSOR'S COVENANTS

Lessor, in consideration of the sums to be paid by Lessee, as hereinafter provided, and of the covenants and agreements herein expressed, hereby covenants and agrees with Lessee as follows:

1. Lessor does hereby lease and demise unto Lessee subject to the terms and conditions hereof, for the term and at the rental herein provided for, space in the said Trailways Bus Station, for use by Lessee as a restaurant, lunchroom, soda fountain, and news stand, which said space is more particularly described as follows:

That certain space in the basement and on the ground floor of the Trailways Bus Terminal to be constructed at the Northwest corner of Broad and Ninth Streets in the City of Richmond, Virginia, and is shown outlined in red on the two diagrams hereto attached and made a part hereof, marked Exhibit A and Exhibit B, respectively.

2. Lessor hereby grants to Lessee for the term and at the compensation hereinafter mentioned, and upon the covenants, conditions, limitations, and agreements hereinafter contained, the sole and exclusive right, permission, license and privilege to sell and serve in the demised space, newspapers, periodicals, magazines, books, stationery, cigars, [fol. 11] cigarettes, tobacco, food; meals, edibles of all kind, candy, confections, gum, soda water, soft drinks, ice cream, fruit, popcorn, nuts, souvenirs, toys, novelties, and all other articles and commodities, commonly sold at news stands, cigar stands, restaurants, soda fountains, and lunch counters; provided, however, that Lessee shall not operate in or upon the demised premises any coin controlled machines or vending machines of any kind or nature whatsoever except upon written consent of Lessor.

3. The right, permission, and license hereby granted to Lessee by Lessor is exclusive, and Lessor shall not sell, or grant similar permission for the sale of the same, or similar articles by any other person, firm or corporation in any other part of said bus station, or on any of the grounds adjacent thereto over which Lessor has control.

4. Lessor shall keep and maintain the building in which the Lessee's premises are situated in good order, condition and repair, including the painting of the interior walls of the leased premises at such time or times as in the opinion of the Lessor might be reasonably necessary.

5. Lessor shall furnish overhead lights, water and heat for the demised premises; provided, however, that Lessee shall furnish, at its own expense, electricity for the heating of water or for any other purpose that electricity might be used by Lessee except for overhead lights.

Lessee's Covenants

Lessee hereby covenants and agrees with Lessor as follows:

6. Lessee shall accept, lease and use, subject to the conditions and for the term hereof, the leased premises as aforesaid, and shall use said space and facilities for the installation, maintenance and operation of a restaurant, lunch room, soda fountain and news stand, and for no other purpose, with the privilege to sell in the demised premises, newspapers, periodicals, magazines, books, stationery, cigars, cigarettes, tobacco, confectionery, candy, popcorn, [fol. 12] peanuts, novelties, flowers, soda water, soft drinks, ice cream, and to sell such other articles and food stuffs in connection with the operation of the restaurant, lunch room, soda fountain, and news stand as are customarily sold in the regular course of business of restaurants, lunch rooms, soda fountains, and news stands. The prices charged by Lessee therefor shall be just and reasonable. No obscene, indecent, or other objectional publications, or photographs shall be offered for sale. Beer and wine shall not be sold on the leased premises.

7. Lessee agrees to discontinue the sale of any commodity that may be objectionable to the Lessor, and Lessee further agrees that it will obtain permission from Lessor to sell any commodity not usually sold or installed in a bus terminal concession before so doing.

8. As a basis for computing the rental due hereunder Lessee shall furnish to Lessor on or before the fifth day of each calendar month during the term hereof a full and complete, true and accurate statement showing the gross receipts of Lessee from the operation of the restaurant, lunch room, soda fountain, and news stand herein provided for during the preceding month.

9. Lessee agrees to pay to Lessor, at its office in the City of Richmond, Virginia, on or before the tenth day of each calendar month during the term hereof, as rental for the premises demised and leased herein, and as compensation for the right, permission, license, and privilege hereby granted, rental computed as follows:

(a) The sum of $30,000.00 annually for gross receipts of Lessee from sales of Lessee upon the leased premises up to and including the total annual sum of $275,000.00, which said rental shall be payable in advance at the rate of $2,500.00 per month, on or before the fifth day of each calendar month during the term hereof.

(b) For gross receipts of Lessee for sales made by Lessee upon said leased premises in excess of the sum of $275,000.00 annually, Lessee shall pay unto Lessor the additional sum of twelve per cent (12%) of all gross receipts of Lessee in excess of said sum of $275,000.00, which said rental shall be due and payable by Lessee within ten (10) days from the end of each year during the term hereof. The statements [fol. 13] furnished by Lessor by Lessee under the provisions of paragraph 8 hereof shall be used in computing such additional rental that might be due by Lessee to Lessor at the end of each year of the term hereof.

The term "Gross Receipts", as herein used shall not include the receipts by Lessee from the sale of tobacco products on the demised premises.

Lessee shall also deduct from said gross receipts all sales taxes and federal excise taxes in the manner prescribed by law for the purpose of computing the rental due Lessor.

10. Lessee shall equip the restaurant, lunch room, soda fountain, and news stand at its own expense with the necessary movable fixtures and furniture and fixed equipment, including counters, tables, chairs, kitchen equipment, soda fountain, news stand, stoves, refrigerators and any and all equipment which may be reasonably necessary or incident to the operation of a restaurant, lunch room, soda fountain, or news stand. Such equipment, fixtures, and furniture shall be maintained and kept in first class condition, good order and repair by Lessee at all times at Lessee's own expense, and Lessee shall replace such equipment, fixtures and furniture with articles of the same kind and equally good when necessary in the opinion of Lessor. Lessee shall obtain the approval of Lessor as to the quality of all the equipment, fixtures and furniture, to be installed by Lessee upon the leased premises.

11. Lessee shall equip said restaurant, lunch room, soda fountain, and news stand at its own expense with the necessary silver ware, china ware, glass ware, linen, kitchen utensils, or any and all articles necessary or used in connection with any or all of the foregoing, and Lessee shall maintain such equipment in good order and repair at all times and shall renew the same when necessary.

12. All equipment, fixtures, and furniture to be installed by Lessee upon the demised premises shall be approved by Lessor in writing, as to the quality of any and all such equipment, fixtures, and furniture; and if at any time during the term hereof Lessee desires to change the location, manner and means of installing any equipment necessary to connect with plumbing, heating, gas, or electric wiring facilities contained in said bus station Lessee shall obtain [fol. 14] prior approval in writing of Lessor before making any such change. Such changes, installations, and connections shall be at *Lessee's sole* expense.

13. Lessee shall pay for all electric current and electric power used in connection with the demised premises (except for overhead lights), shall pay for all gas used in connection with the operation of the restaurant, lunch room, soda fountain, and news stand by Lessee, and shall furnish at Lessee's own expense such facilities and appliances as are used by Lessee for the heating of water in connection with the use of said leased and demised premises. In the event of the failure of Lessee to pay any or all of any such charges, Lessor at its option shall have the right to pay or advance the same in behalf of Lessee, and in such event such payments, or advancements made by Lessor in behalf of Lessee shall be chargeable to or added to the rental due hereunder by Lessee to Lessor.

14. Lessee shall at all times maintain said leased facilities in good order, and at the expiration of the term hereof, or upon surrender of possession of said leased premises to Lessor by reason of default by Lessee, as herein provided for, the said leased premises will be surrendered to Lessor in the same condition as at commencement of the term hereof, ordinary wear and tear excepted.

15. Lessee shall and does hereby assume all risk of loss or injury to property or persons of all officers, agents and

employees or customers of said Lessee, or other persons coming upon the leased premises at the instance of or with the consent or knowledge of Lessee, and Lessee shall and does hereby agree to indemnify and save harmless Lessor from and for any and all claims, demands, suits, judgments, costs or expenses on account of such loss or injury. If suit be brought again Lessor upon any claim in respect of which under the terms hereof Lessor is entitled to protection and indemnity, Lessee, upon notice of such suit, shall assume the defense thereof.

Lessee covenants that it will carry public liability insurance in a company or companies satisfactory to Lessor in an amount of not less than Twenty-five Thousand Dollars ($25,000.00) to cover any or all of the foregoing, which insurance shall run in favor of Lessee and Lessor.

[fol. 15] 16. Lessee shall not, at any time of the term hereof, make any alteration or addition in or to the leased premises without the prior written consent and approval of Lessor.

17. Lessee shall not assign or sublease the premises hereby leased, or any part thereof, or assign or transfer any right, permission, license or privilege hereby granted without first obtaining the written consent of the Lessor.

18. Lessee's employees shall be neat and clean in appearance, and the operation of the restaurant and the said stands shall be in keeping with the character of service maintained in an up-to-date, modern bus terminal. Any employees not conducting themselves in keeping with the requirements of this service or found to be of unsatisfactory character shall be reported by the Lessor to the Lessee for correction and if same is not corrected within a reasonable time, the Lessor may request removal of or dismissal of such unsatisfactory employees. Neither the Lessee nor its employees shall be allowed to perform any terminal service other than that pertaining to the operations outlined in this contract; nor shall Lessee or its employees sell transportation of any kind or give information pertaining to schedules, rates or transportation matters, but shall refer all such inquiries to the proper agents of Lessor.

19. Lessee shall maintain and operate the restaurant and lunch room in the demised premises in a manner so as

to keep a Grade A certificate therefor, and upon the failure of Lessee to so do, Lessor may terminate this lease in the manner described in paragraph 27 hereof: provided, however, that if and in the event the restaurant and lunch room in the demised premises shall receive a rating lower than a Grade A certificate through no fault of Lessee, because of conditions prevailing in said bus station then the right of Lessor to terminate this agreement because of such rating shall not become effective until Lessor has corrected such conditions in the bus station premises that caused such low rating.

MUTUAL COVENANTS

The parties hereto severally covenant and agree with each other as follows:

[fol. 16] 20. This Agreement in every provision hereof shall insure to the benefit of and be binding upon Lessor and Lessee, and their respective heirs, successors, and assigns. The words "Lessor" and "Lessee" wherever used herein shall include the heirs, successors, and assigns of the respective parties hereto.

21. In the event the station building in which the leased premises are located is rendered wholly untenatable by fire or otherwise, Lessor may at its option, either immediately cancel or terminate this lease, or else, to restore or rebuild within a reasonable time said bus station building including the premises, leased hereunder, in the same condition at they were at the time of the commencement of the term hereof. In the event of such cancellation and termination of said lease by Lessor, the rental due by Lessee shall cease on and as of the date of such termination, and in the event the premises are rebuilt or restored, Lessee shall not pay rent to Lessor during such term as the premises are wholly untenantable.

22. Any notice to be given or required to be given to the Lessee under the terms hereof shall be deemed sufficient if delivered or mailed to the agent of Lessee in charge of the demised premises, and any notice given or required to be given to Lessor shall be deemed sufficient if delivered or mailed to Lessor addressed to the General Manager, Trailways Bus Terminal, Inc., Richmond, Virginia.

23. Lessee shall pay any and all taxes of any kind or nature whatsoever, including license for privilege taxes, that are lawfully due and payable to any existing governmental body arising from or in connection with the business conducted by Lessee on leased premises, or on the furniture, fixtures and equipment installed therein by Lessee.

24. Lessor shall operate said bus terminal in said bus station building in accordance with the rules and regulations of any lawful governmental agency having jurisdiction thereof; and it is understood by and between the parties hereto that this Agreement and all provisions herein contained are subject to all valid rules and regulations of such regulatory authorities having jurisdiction thereof during the full term hereof. Lessee shall comply with all the ordinances of the City of Richmond, and the laws of the United States and the State of Virginia in respect to the conduct of business of Lessee on the demised premises.

[fol. 17] 25. Lessee shall not make any sales on buses operating in and out said bus station; but sales through the windows of said buses may be made by Lessee, provided, however, that Lessee shall cease making sales through windows of buses within thirty (30) days after receipt of notice in writing from Lessor to terminate such sales.

26. Lessee hereby grants to Lessor the right at any and all times hereof to examine the books, records, cash register accounts and vouchers of Lessee for the purpose of verifying the accuracy of gross receipts of Lessee as are furnished to Lessor under the terms hereof. It is understood that such examination or audits shall be made by Lessor at least semi-annually during the term hereof.

27. If Lessee shall fail to pay to Lessor any sum payable by Lessee hereunder on or before the date when the same shall become due, or shall fail to perform, or comply with any covenant or condition contained herein, and such default shall continue for a period of ten (10) days after notice in writing from Lessor to Lessee, then and in such event Lessor shall have and is hereby given, the right of its election to exclude Lessee from the use of the leased premises, and upon giving ten (10) days notice in writing

of such election to Lessee, all rights of Lessee to use the leased premises, and any and all other rights of Lessee hereunder shall then and there be terminated and Lessor shall have the right to enter upon the demised premises; but such termination shall not relieve Lessee from any liability that might have been accrued prior to the date of such termination.

28. Upon the termination of this Agreement, Lessee shall promptly surrender to the Lessor possession of the premises hereby leased, exclusive of stands, counters, soda fountain, and other equipment furnished or installed by or at the expense of the Lessee, which are to be deemed the personal property of the Lessee and may be removed by him, provided Lessee is not in arrears in rent, and in the event Lessee is in arrears, then Lessor may sell so much of said personal property as is necessary to satisfy the claims for rent. Upon the termination of the Agreement, Lessee shall promptly remove all equipment, fixtures, and furniture installed by Lessee in the demised premises, at Lessee's sole expense, and restore the premises to the same condition that they were at the commencement of the terms hereof, ordinary wear and tear excepted.

[fol. 18] 29. The term hereof shall be for the period of five (5) years, beginning Dec 2, 1953, and ending Dec 2, 1958; provided, however, that this lease shall be automatically renewed for an additional term of five (5) years unless either party hereto shall notify the other party hereto, in writing at least ninety (90) days prior to the expiration date of the five-year term hereof, of the desire of such party to cancel and terminate this lease. In the event the leased premises described in paragraph 1 hereof are not completed and ready for occupancy by Dec 2, 1953, then and in such event the term hereof shall begin on and as of the date that said leased premises are completed and are ready for occupancy and shall continue for the full term of five (5) years thereafter.

In Witness Whereof, the parties hereto have executed this instrument on the day and year first above written.

Trailways Bus Terminal, Inc.
By /s/ R. C. Hoffman, Jr.
President

ATTEST:
/s/ R. B. SMALL
Secretary

BUS TERMINAL RESTAURANT OF RICHMOND, INC.
By /s/ J. BERNARD PARKER
Pres.

ATTEST:
/s/ BRYCE WAGONER
Secretary

(ADD APPROPRIATE ACKNOWLEDGMENTS)

[fol. 19] STATE OF NORTH CAROLINA
COUNTY OF WAKE, To-wit:

I, Daisy A. Harris, a notary public in and for the City and State aforesaid do hereby certify that R. C. Hoffman, Jr., and R. B. Small, whose names are signed to the foregoing writing bearing date on the 2nd day of December, 1953, as President and Secretary of TRAILWAYS BUS TERMINAL, INC., have acknowledged the same before me in my City aforesaid.

Given under my hand this 7th day of January, 1954.

My commission expires on the 29th day of April, 1955.

/s/ DAISY A. HARRIS
Notary Public

STATE OF VIRGINIA
CITY OF NORFOLK, To-wit:

I, G. A. Callahan, a notary public in and for the City and State aforesaid do hereby certify that J. Bernard Parker and Bryce Wagoner, whose names are signed to the foregoing writing bearing date on the 2nd day of Dec. 1953, as President and Secretary of BUS TERMINAL RESTAURANT OF RICHMOND, INC. have acknowledged the same before me in my City aforesaid.

Given under my hand this 19th day of December, 1953.

My commission expires on the 13th day of May, 1957.

/s/ G. A. CALLAHAN
Notary Public

[fol. 20]

ATTACHMENT TO STIPULATION

VIRGINIA:

IN THE POLICE COURT OF THE CITY OF RICHMOND

CITY OF RICHMOND

v.

BRUCE BOYNTON

TRIAL PROCEEDINGS

January 6, 1959.

10:15 a. m.

Before Honorable Harold Maurice, Judge

APPEARANCES:

Charles E. Maurice, Assistant Commonwealth's Attorney, For the City of Richmond.

Hill, Martin, and Olphin, Counsel for Defendant, By Martin A. Martin.

Also present:

Walter E. Rogers, For the Bus Terminal Restaurant Company, Incorporated.

[fol. 21] PROCEEDINGS

Mr. Rogers: Your Honor, I represent the Richmond Bus Terminal Restaurant and am appearing with the Commonwealth's Attorney.

The Court: Bruce Boynton, on the 20th day of December, did trespass upon the premises at the Trailways Bus Terminal, Ninth and Broad Streets. What is his plea?

Mr. Martin: Not guilty.

STANLEY SYLVANIUS RUSH, having been sworn, in behalf of the City testified as follows:

Direct examination.

By Mr. Rogers:

Q. Mr. Rush, you are the Assistant Manager of the Bus Terminal Restaurant in Richmond, Incorporated, are you not?

A. Yes, sir.

Q. That is located at the Trailways Bus Terminal here at Ninth and Broad?

A. That's right, sir.

Mr. Martin: Pardon me a minute. I wonder if we could get his full name and address for the record.

[fol. 22] By Mr. Rogers:

Q. Will you state your full name and address?

A. My name is Stanley Sylvanius Rush. I live at 2200 Mimosa Street, Richmond, Virginia.

Q. And you are Assistant Manager of the Richmond Bus Terminal Restaurant in Richmond?

A. I am.

Q. That company leases space in the building there at Ninth and Broad for the purpose of operating a restaurant, does it not?

A. Yes, sir.

Q. The company that operates the restaurant is not affiliated in any way with the bus company, is it?

A. No, sir, it is not.

Q. The bus company has no control over the operation of the restaurant?

A. None whatsoever.

Q. What facilities do you have at the restaurant for serving both white and colored, Mr. Rush?

A. We have a restaurant on one side for colored; we have one restaurant for the white.

Q. Were you on duty on December 22, when the defendant Bruce Boynton came into the white portion of the restaurant and asked to be served?

A. Yes, I was.

[fol. 23] Q. Will you tell the Court what happened?

A. When he came in he seated himself in the white section. He was asked to leave and go over. I explained to him that they had a restaurant on the other side for the colored and we would appreciate it if he would go over there, at which time he demanded service there. I went to him then and talked to him and tried to explain to him the situation, at which time he refused to leave, demanded service.

I then called the officer to come over and see if he could get him to leave, that he was causing a disturbance there, which the officer could, he went out and tried to explain to him the situation and came back and told me—asked me if I wanted a warrant for this man's arrest and I told him I would rather not, if he would stay out of the place that that would be all that was necessary, which I looked up and he had returned to the restaurant and seated himself again. After seating, he got up and came forward towards the end of the counter, which is part of the aisle way behind the counter section, at which time I asked the officer to call the magistrate, that I would issue a warrant for his arrest for trespassing.

Q. You definitely asked him and instructed him to leave the white portion of the restaurant and advised him he could be served in the colored portion?

A. I did.

[fol. 24] Q. And he returned after you had instructed him that he could not be served in the white section?

A. Yes, sir, he did.

Mr. Rogers: That is all.

Cross examination.

By Mr. Martin:

Q. Mr. Rush, I just want to be clear on this. You say you are Assistant Manager of what?

A. Bus Terminal Restaurant Company.

Q. Company, Incorporated?
A. That's right.
Q. A Virginia corporation?
A. Yes, sir.
Q. You are the Assistant Manager?
A. I am Assistant Manager.
Q. What first called your attention to this young man here being in the restaurant? Did one of the waitresses call your attention to the fact?
A. I had seen him in there. At the time I was busy and couldn't get to him myself to explain the situation, which everyone has been instructed to always—
Q. Just a minute. I am not asking about your instructions. Who first called your attention to him being in the restaurant?
[fol. 25] A. I saw him myself.
Q. Did a waitress later call your attention to the fact?
A. Yes.
Q. You say you have two restaurants there, one customarily used for colored people and one white?
A. That's right.
Q. What is the approximate size of the colored restaurant?
A. I believe the seating capacity is that of about fifty.
Q. What is the area space?
A. I don't know that right offhand. I can give you that.
Q. About twenty-five or thirty feet?
A. No, it is more than that.
Q. This happened on a Saturday night, I believe, December 22?
A. Yes, sir.
Q. About what time?
A. Approximately ten-thirty.
Q. Colored restaurant was crowded at that time?
A. No. We had customers in there, but there was seating capacity.
Q. What is the seating capacity of the white restaurant?
[fol. 26] A. That, I don't know exactly either, I would have to look that up.
Q. You have tables and stools at the counter in the white restaurant?
A. Yes, sir.

Q. Where was this defendant seated, at the table or stool?

A. At a stool.

Q. He was seated at a stool at the counter?

A. Yes, sir.

Q. When this waitress complained, didn't she tell you that he was asking for a sandwich and cup of tea?

A. She didn't tell me what he was asking for.

Q. But he was asking for service?

A. Yes, sir.

Q. You knew that he was a passenger on the Trailways bus?

A. At that time, no.

Q. You didn't?

A. No.

Q. Before he was arrested, you knew he was a passenger on the bus, didn't you?

A. But I said at that time.

Q. Didn't he show you a ticket? Didn't he tell you that [fol. 27] he was a passenger on the Trailways bus from Washington going to Montgomery, Alabama?

A. After I had sent to the magistrate for his arrest, then his ticket was produced.

Q. And you knew at the time the magistrate came and you issued the warrant that he was a passenger on this bus going from Washington to Montgomery, Alabama?

A. I said until the magistrate issued the warrant was the ticket then produced.

Q. Did he do anything else besides ask for service there at the restaurant and just remain there when he was asked to leave?

A. No, he got up and walked up and down the aisle demanding service from the waitress and telling her that she had better talk to me and have service right there or else he was going to do this, that, and the other.

Q. Your restaurant is primarily or partly for the service of the passengers on the Trailways bus?

A. For the white on that side, colored on the other.

Q. It is for passengers on the bus, for white passengers?

A. Not necessarily, no. We have quite a bit of business here from local people.

Q. If he had been a white person, would you have refused [fol. 28] him service, if he had been a white passenger on a Trailways bus at that time, that particular time, would you have refused him service?

A. Walking up and down the aisle, demanding service immediately, I probably would have.

Q. When he was setting at the stool at the counter asking for a sandwich, if he had been a white person would you have given him service?

Mr. Rogers: If Your Honor please, this seems to be going afield. The testimony indicates that the restaurant is operated entirely separate from the bus terminal and he was asked to leave.

The Court: He can ask the question, but I do not think it is going to be anything to connect the bus company up with the restaurant. Go ahead.

Mr. Martin: Will you answer that question?

A. If he had been—

By Mr. Martin:

Q. If he had been a white person seated at the counter on a stool, would you have instructed the waitress to give him service?

A. I said no, not necessarily.

Q. Why?

[fol. 29] A. If any passenger or any person comes in and starts creating a disturbance, we immediately ask them to leave.

Q. Mr. Rush, I did not ask you that question. Can't you answer the question that I asked you? I asked if he was a white passenger seated at the stool, as you said he was seated at the counter, and asked for service, would you have given him service?

A. I said no, not necessarily.

Q. Why not?

A. Anyone that creates a disturbance I would have asked him to leave, which he was doing at that time when he started that. That is when he returned the second time is when I got the warrant, not the first time.

Q. Why didn't you get a warrant charging him with creating a disturbance if he was creating a disturbance?

A. Because I only wanted trespassing.

Q. Why?

A. Because I had asked him to leave and he refused to leave.

Q. So the only crime you know that he was guilty of was trespassing?

A. That is what I took the warrant for.

Q. When this waitress came to you and told you that he was over there, didn't she tell you that he was asking [fol. 30] to be served?

A. Yes.

Q. And she refused to serve him?

A. Yes.

Q. Because of his race?

A. She refused to serve him because we have a restaurant on the other side, which she tried to explain to him.

Mr. Martin: That is all.

Mr. Rogers: No questions.

Russell Forest Stout, having been sworn in behalf of the City, testified as follows:

Direct examination.

By Mr. Rogers:

Q. You are the officer that made this arrest?

The Court: Let him state his name and occupation.

The Witness: Russell Forest Stout: patrolman, Richmond Police.

By Mr. Rogers:

Q. Officer Stout, you were on duty at the restaurant, at the Bus Terminal, at the time of this occurrence?

A. Yes, sir.

[fol. 31] Q. You are familiar with what took place?

A. Yes, sir.

Q. Is it substantially as related by Mr. Rush?
A. Yes, sir.

Mr. Rogers: No questions.

Cross examination.

By Mr. Martin:

Q. Did you see any disorderly conduct?
A. Not too much. He was disturbing the peace some.
Q. But just by being in there, a colored person in a white restaurant?
A. Not necessarily that. He was raising his voice a certain amount.
Q. There was no profane language nor cursing or anything?
A. No, I didn't hear any.
Q. No fighting or fussing?
A. No.

Redirect examination.

By Mr. Rogers:

Q. Was the waitress around when he was demanding service in the restaurant?
[fol. 32] A. I wasn't in there. He was standing up. Mr. Rush told me that he had.

Recross examination.

By Mr. Martin:

Q. And you arrested him and put him in the patrol wagon and took him to the station?
A. On the warrant.

Mr. Martin: Any other witness?
Mr. Rogers: No.

Evidence Adduced in Behalf of Defendant

Bruce Boynton, the defendant, was sworn, and in his own behalf testified as follows:

Direct examination.

By Mr. Martin:

Q. Will you state to the Court your name and your home address?

A. If it please the Court, my name is Bruce Boynton, and my home is address is 1315 Lapsley Street, Selma, Alabama.

Q. Are you at the present time attending school?

[fol. 33] A. Yes, sir, I am.

Q. Where?

A. I am a third-year student at Howard University, at law school.

Q. On this particular occasion, were you traveling from Washington, D. C., at school to your home in Selma, Alabama?

A. Yes, sir. I was traveling from Washington, D. C.

Q. Just answer the question. Were you traveling from Washington, D. C., to your home in Selma, Alabama?

A. Yes, sir.

Q. By Trailways bus?

A. Yes, by Trailway to Montgomery.

Q. Did you have a ticket entitling you to travel by Trailway bus from Washington to Montgomery, Alabama?

A. Yes, sir, I did.

Q. Is that a stub of that ticket (exhibiting)?

A. That is the stub.

Mr. Martin: If Your Honor please, I offer this in evidence.

(The ticket stub was exhibited and retained by counsel for the defendant.)

Q. What time did you board the Trailway bus in Wash-

[fol. 34] ington?

A. I boarded the Trailways bus at eight o'clock.

Q. What time did you arrive in Richmond?

A. About 10:40.

Q. Why did you get off the bus in Richmond?

A. I got off the bus in Richmond because I was hungry and we had a stopover of about forty minutes.

Q. Who told you about the stopover?

A. The bus driver, when he pulled the bus up to the stop at the terminal.

Q. At the time, did you know anybody in Richmond?

A. No, no one except a couple of students, classmates of mine.

Q. And the bus driver told you you had about a forty-minute layover and you went in the bus station for what purpose?

A. To get something to eat.

Q. Did you see the colored restaurant there?

A. Yes, sir, I did.

Q. What was the condition?

A. The colored restaurant appeared to be crowded and I proceeded to the other restaurant.

Q. Was that other restaurant crowded?

A. No, it wasn't.

Q. There are stools at the counter?

[fol. 35] A. Yes, sir.

Q. Vacant stools?

A. Vacant.

Q. Where did you sit?

A. I took one of the vacant stools at the counter.

Q. What did you say? Just tell the Court what happened.

A. Well, at the time that I sat down the waitress—one of the waitresses on duty came up to me and asked me to go over on the other side, that they had facilities over there. I told the waitress that the facilities over there were a bit crowded and also that I was an interstate passenger and that I could eat there at that restaurant. She told me that she had orders and it was customary not to serve me.

Whereupon I explained to her again that I was an interstate passenger and that I had a bus to catch in about thirty minutes, thirty or forty minutes, and that I would like something that wouldn't take too long to prepare.

Whereupon she suggested that I purchase a prepared sandwich, sandwich that was already made. I believe they had some several lined up to the counter there. So I ordered one of the sandwiches and tea with cream. She didn't write the order, but she went away and then came back and said that she couldn't serve me, she had orders not to serve me. Whereupon, I asked her to get someone who [fol. 36] could since she had orders not to and that I was an interstate passenger. She went away and Mr. Rush here appeared and told me that I couldn't be served and suggested that I go over on the other side.

At that time I pulled out my ticket, showed it to him, explained what that passenger was, and he asked me to move. He made a demand for me to move and I refused.

He went away and I sat there. The next thing that happened was that Officer 198 appeared and told me that I was under arrest. I explained to him that I was an interstate passenger also and he conferred, I believe, with Officer 66, who I later went into the custody of this officer, and they wrote out a warrant and I proceeded on the bus in the custody of Officer 198 and took my things off and disembarked from the bus.

Q. You were placed in a patrol wagon?

A. That is right.

Q. During this entire time, was any profane language used, any loud words, curse words, or any disorderly conduct?

A. No. I just emphatically, I suppose, expressed my point of view as being an interstate passenger, but not loud, not boisterous, and I remained sitting.

Q. Did you know any other place? Have you ever been in Richmond before?

[fol. 37] A. Not for a stop. I have passed through.

Q. Did you know any other place where you could get anything to eat within thirty or forty minutes?

A. No, I didn't.

Q. You say the colored restaurant was crowded at that time?

A. That is right.

Q. And the only thing you did, as I understand, was you saw the colored restaurant crowded, you went in the white

restaurant and sat at the stool and demanded service as a passenger on the Trailway bus?

A. That is right.

Q. They refused to serve you and ultimately you wound up being arrested?

A. Yes, sir.

Mr. Martin: That is all.

Cross examination.

By Mr. Rogers:

Q. To clear the record, both the management and the officer asked you to leave the white portion and advised you that you could be served in the colored portion of the restaurant?

A. He did make a demand that I leave.

Mr. Rogers: That is all.

[fol. 38] The Court: That is all of the case?

Mr. Martin: Yes, sir.

The Court: Find him guilty and fine him $10.00.

Mr. Martin: Note an appeal, sir.

(Whereupon, at 10:34 a. m., the trial was concluded.)

[fol. 39]

In the Hustings Court of the City of Richmond

Appeal.

Commonwealth

vs

Bruce Boyington, Dft.

Judgment—February 20, 1959

The said defendant this day again appeared and was set to the bar in the custody of the Sergeant of this City and after maturely considering the evidence doth find the said defendant guilty as charged and doth assess his fine at ten dollars.

Whereupon it is considered by the Court that the said Bruce Boyington pay and satisfy a fine of ten dollars and costs. And on his motion the execution of the said sentence is suspended during his good behavior until March 6, 1959.

[fol. 40]

IN THE HUSTINGS COURT OF THE CITY OF RICHMOND

[Title omitted]

ORDER OVERRULING MOTION TO DISMISS WARRANT AND SUSPENDING EXECUTION OF SENTENCE—March 6, 1959

The said defendant this day again appeared and was set to the bar in the custody of the Sergeant of this City and having been found guilty of unlawful trespass, as entered herein February 20, and execution of said sentence suspended to this day and the said defendant this day having filed his motion in writing to dismiss the warrant in this case, which motion was also made at the trial of this case February 20, 1959 and overruled by the Court, which motion the Court doth again overrule and to which action of the Court in overruling his said motion the said defendant notes an exception and time is given him not exceeding sixty days in which to present his bills of exceptions.

Thereupon the said defendant moved the Court to suspend the execution of the sentence to allow him to appeal to the Supreme Court of Appeals of Virginia, which motion the Court doth grant and the execution of the said sentence entered herein February 20, 1959, is this day suspended to May 26, 1959. And thereupon the said defendant entered into a recognizance in the sum of three hundred dollars with Roberta B. Shores, as surety, conditioned that if the said Bruce Boyington shall make his appearance before this Court May 26, 1959, to abide by and perform the judgment entered against him herein February 20, 1959, in the event the Supreme Court of Appeals should affirm same or refuse to grant a writ of error, or if same be granted it be afterwards dismissed, and in the meantime keep the peace and be of good behavior and not violate any of the laws of this Commonwealth, then the said recognizance to become null and void, else to remain in full force and virtue. And thereupon the said defendant is released.

[fol. 41]

IN THE HUSTINGS COURT OF THE CITY OF RICHMOND

[Title omitted]

ORDER RE TRANSCRIPT—April 8, 1959

The transcript of the evidence adduced, the objections to evidence and other incidents in the trial was this day signed and sealed by the Court and delivered to the Clerk of this Court and hereby made a part of the record in this case.

[fol. 42]

CERTIFICATION TO TRANSCRIPT OMITTED IN PRINTING

[fol. 43]

IN THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

ORDER REFUSING WRIT OF ERROR—June 19, 1959

The petition of Bruce Boynton for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 20th day of February, 1959, in a prosecution by the Commonwealth against Bruce Boyington, alias Bruce Boynton, for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said Hustings Court.

[fol. 44]

IN THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

[Title omitted]

ORDER STAYING EXECUTION AND ENFORCEMENT OF JUDGMENT —July 24, 1959

On consideration of the petition of Bruce Boynton, by counsel, for a stay of execution herein, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, It Is Now Ordered that the execution and enforcement of the judgment of this court in the above-entitled case entered on June 19, 1959, be, and the same is hereby, stayed until the 17th day of September, 1959, on the expiration of which time the same may be enforced, unless the case has before that time been docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

Willis D. Miller, Justice of the Supreme Court of Appeals of Virginia.

[fol. 45] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 46]

SUPREME COURT OF THE UNITED STATES

No. 469, October Term, 1959

BRUCE BOYNTON, Petitioner,

vs.

VIRGINIA.

ORDER ALLOWING CERTIORARI—February 23, 1960

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 15 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. ~~109~~ 7

BRUCE BOYNTON,

Petitioner,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

MARTIN A. MARTIN
118 East Leigh Street
Richmond 19, Virginia

CLARENCE W. NEWSOME
118 East Leigh Street
Richmond 19, Virginia

THURGOOD MARSHALL
CONSTANCE BAKER MOTLEY
JACK GREENBERG
10 Columbus Circle
New York 19, New York

Attorneys for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1959

No. .....

BRUCE BOYNTON,

Petitioner,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of the Commonwealth of Virginia.

Opinions Below

No opinion was rendered in this case by the Supreme Court of Appeals of Virginia when it denied the petitioner a writ of error to the judgment of the Hustings Court of the City of Richmond on the 19th day of June, 1959. No opinion was rendered by the Hustings Court of the City of Richmond on the 20th day of February, 1959 when it found petitioner guilty of a violation of §18-225 of the Code of Virginia, 1950, as amended.

Judgment

The judgment of the Supreme Court of Appeals of Virginia was rendered on the 19th day of June, 1959 and a stay of execution and enforcement of the judgment of said

Court was granted on the 24th day of July, 1959 staying the execution and enforcement of same until the 17th day of September, 1959, unless the case has before that time been docketed in this Court in which event enforcement of said judgment shall be stayed until the final determination of this case by this Court.

Questions Presented

1.

Whether the criminal conviction of plaintiff, an interstate traveller, for refusing to leave an interstate bus terminal restaurant where he sought refreshment at a regularly scheduled stop in the course of his interstate journey and was barred solely because of his race, is invalid as a burden on interstate commerce in violation of Article I, §8, Clause 3 of the United States Constitution.

2.

Whether said conviction violates the due process and equal protection clauses of the 14th Amendment of the Constitution of the United States.

Constitution and Statutory Provisions Involved

This case involves:

Article I, §8, and the due process and equal protection clauses of the XIV Amendment of the Constitution of the United States.

§18-225 of the Code of Virginia of 1950. This statutory provision is set forth in the statement, *infra*, p. 4.

Statement of the Case

Bruce Boynton, petitioner, a Negro student at the Howard University School of Law, Washington, D. C., purchased a ticket, in Washington, D. C., for transportation by Trailways Bus to Montgomery, Alabama, via Richmond, Virginia, and then with connecting carrier to his home in Selma, Alabama. He boarded a Trailways Bus in Washington, D. C., at 8:00 p. m., and arrived at the Trailways Bus Terminal in Richmond, Virginia about 10:40 p. m. The bus driver notified him and all other passengers that there would be a forty minute layover at the Richmond Trailways Terminal (R. 31-33).

Petitioner left the bus, entered the waiting room of the terminal and noticed a small restaurant crowded with colored patrons. He proceeded through the waiting room and approached another restaurant, which was practically empty, adjacent to the waiting room (R. 33). He entered that restaurant, where the white waitress informed him that he could not be served. She advised him to go to the colored restaurant. He explained that the colored restaurant was crowded, that he was an interstate passenger, and that he desired to be served before boarding his bus which was due to leave shortly (R. 34-35). She persisted in stating that it was not the custom to serve Negroes in that particular restaurant. He then inquired who could serve him. The waitress called the assistant manager who demanded that petitioner leave, and stated that he could not be served in that restaurant because he was colored (R. 35).

When petitioner refused to leave the restaurant the assistant manager caused him to be arrested (R. 35) and charged with a violation of §18-225 of the Code of Virginia of 1950, as amended which provides:

"If any person shall without authority of law go upon or remain upon the lands or premises of another after having been forbidden to do so by the owners, lessee, custodian or other person lawfully in charge of such land, or after having been forbidden to do so by sign, or signs posted on the premises at a place or places where they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $100.00 or by confinement in jail not exceeding thirty days, or by both such fine and imprisonment."

The bus terminal was owned and operated by Trailways Bus Terminal, Inc. (R. 9-17). The restaurants therein were built into the terminal upon its construction and leased by Trailways to Bus Terminal Restaurant of Richmond, Inc. (R. 9-17). The lease gave exclusive authority to the lessee to operate restaurants in the terminal, required that they be conducted in a sanitary manner, that sufficient food and personnel be provided to take care of the patrons, that prices be just and reasonable, that equipment be installed and maintained to meet the approval of Trailways, that lessee's employees be neat and clean and furnish service in keeping with service furnished in an up-to-date, modern bus terminal; prohibited the sale of alcoholic beverages on the premises; and permitted cancellation of the lease upon the violation of any of its conditions (R. 9-17).

Petitioner was convicted in the police court of the City of Richmond and fined $10.00, which conviction was appealed to the Hustings Court of the City of Richmond which affirmed (R. 38). Petition for writ of error to the Supreme Court of Appeals was rejected, the effect of which was to affirm the judgment of the Hustings Court (R. 42). The affirmance by the Supreme Court of Appeals of Virginia, appears in the Appendix, *infra*, p. 11. In the Hustings Court

of the City of Richmond petitioner objected to the criminal prosecution on the grounds that it contravened his rights under the Commerce Clause of the United States Constitution (Article 1, Section 8) and the Interstate Commerce Act (Title 49 U. S. C., Section 316(d)) and that he was thereby denied due process and equal protection of the laws (R. 5). Said objections were renewed by notice of appeal and assignment of error to the Supreme Court of Appeals of Virginia (R. 3). These defenses, however, as aforesaid, were rejected at all stages of the litigation without opinion.

Reasons Relied on for Allowance of the Writ

I. The decisions below conflict with principles established by decisions of this Court by denying petitioner, a Negro, a meal in the course of a regularly scheduled stop at the restaurant terminal of an interstate motor carrier and convicting him of trespass for seeking nonsegregated dining facilities within the terminal.

In *Morgan* v. *Virginia*, 328 U. S. 373 this Court held that Virginia could not require racial segregation on interstate buses. The basis of the decision is that the enforcement of such seating arrangements so disturbed Negro passengers in interstate motor travel that a burden on interstate commerce was created in violation of Article 1, Section 8 of the United States Constitution. *Id.* at 382. This Court held that absent congressional legislation on the subject the Constitution required "a single uniform rule to promote and protect national travel." *Id.* at 386. An identical rule has been applied to similar racial restrictions on commerce imposed by rules of the carrier enforced by arrest and criminal conviction. *Whiteside* v. *Southern Bus Lines*, 177 F. 2d 949 (6th Cir. 1949); *Chance* v. *Lambeth*, 186 F. 2d 879 (4th Cir. 1951), cert. denied 341 U. S. 941. It

is obvious that interstate bus travel cannot be conducted without regularly scheduled rest stops and anyone who has travelled for long distances on an interstate bus knows that dining facilities at such stops are an essential part of interstate bus service. In fact, in this case the record reveals that the Richmond Terminal, at which petitioner's arrest occurred, was designed to incorporate a restaurant at the time of its construction (R. 9). To deny petitioner a meal at the terminal obviously was as disturbing to him or indeed far more disturbing than the shifting about of passengers on a bus which this Court condemned in *Morgan, supra.*

Petitioner here testified that the colored restaurant appeared to be crowded at the time he approached it during the layover, while the white restaurant was not crowded (R. 33). Although the assistant manager of the bus terminal restaurant testified that there was "seating capacity" in the colored restaurant at or around the time petitioner entered the white restaurant (R. 24) this apparent conflict may be explained by the fact that passengers-customers come and go: if petitioner had waited in the colored restaurant he might have eventually been served. But it surely is a burdensome discrimination in service to subject one class of passengers to the uncertainty of waiting at a colored restaurant for the chance of a seat while seats surely are available at the white restaurant.

But petitioner's objection to the police enforced segregation is more fundamental. In *Henderson* v. *United States,* 339 U. S. 816, 825, this Court, while dealing with the Interstate Commerce Act, condemned racial segregation in railroad dining cars as "emphasiz[ing] the artificiality of the difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility." An interstate traveler finds such treatment as objectionable

in a terminal as he does on a moving diner. Moreover, clearly even more disruptive of a smooth interstate journey was petitioner's arrest and conviction which enforced the racial restriction see *Morgan* v. *Virginia, supra.* These decisively interrupted the trip. That the restaurant in question was leased by the terminal to a restaurant operator hardly made the interruption of petitioner's journey less conclusive.

As the terminal's lease to the restaurant operator indicates (R. 9), the lease was made prior even to the construction of the terminal. The restaurant was built as an integral and essential part of the interstate facility. The lessor imposed conditions on the lessee designed to assure adequate sanitary conditions, reasonably priced service for restaurant patrons, and the right to cancel the lease upon violation of any of its conditions. Access to the restaurant obviously facilitated interstate travel, and was intended to. Conversely, exclusion impeded the smooth flow of national commerce, notwithstanding internal proprietary arrangements within the terminal.

It cannot seriously be urged that because the terminal is stationary or local as to some persons, it therefore is not in interstate commerce at all and that petitioner's treatment for that reason did not constitute a burden on interstate commerce. This Court has held that a transaction with a red cap at a railroad station is in interstate commerce, *N. Y. N. H. & H. R. Co.* v. *Nothnagle*, 346 U. S. 128. As stated in that case at p. 130, "Neither continuity of interstate movement nor isolated segments of the trip can be decisive. 'The actual facts govern. For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce,'" citing *Sprout* v. *South Bend*, 277 U. S. 163, 168. Moreover, grain elevators surely as stationary as the bus terminal have been held to be in inter-

state commerce. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 229. And taxi service between two rail terminals in Chicago which to the man in the street might look like ordinary local taxi traffic also has been held to be in interstate commerce. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 228.

The operation of a bus terminal surely falls within the principle of such cases at least insofar as it applies to an interstate bus passenger who attempts to use its facilities in the usual manner in the normal course of an interstate bus trip.

II. *Petitioner's conviction which served only to enforce the racial regulation of the bus terminal restaurant conflicts with principles established by decisions of this Court.*

If anything is fundamental in constitutional jurisprudence it is that the state may not enforce racial regulations. *Shelley* v. *Kraemer*, 334 U. S. 1, invalidated judicial enforcement of private racially restrictive covenants by court injunction. *Barrows* v. *Jackson*, 346 U. S. 249, held that racially restrictive covenants could not be enforced by the courts by assessing damages for their violation. *Marsh* v. *Alabama*, 326 U. S. 501 held that the criminal courts could not be employed to convict of trespass persons exercising Fourteenth Amendment rights.

In this case petitioner conducting himself in a manner entirely normal for an interstate passenger ran afoul of the terminal restaurant's racial rule. While he may bring civil suit against the terminal for refusal to serve him, see *Whiteside* v. *Southern Bus Lines, supra, Chance* v. *Lambeth, supra, Valle* v. *Stengel*, 176 F. 2d 697 (3d Cir. 1949), perhaps he might also have chosen to suffer the indignity and discomfort and done nothing. But here the terminal chose to invoke the power of the State, which readily com-

plied, to convict petitioner of a crime. Apart from the fairly substantial penalty which could have been imposed or the modest, but highly inconvenient penalty and attending criminal proceedings in which he became embroiled, it may be noted that he is a law student whose opportunity for admission to the bar obviously will be complicated by a criminal conviction on his record. At least to the extent that the State criminal machinery has been used to enforce discrimination, therefore, the judgment below conflicts with the long, consistent line of decision in this Court. For this reason, therefore, the writ of certiorari should be granted to correct the grievous error and injustice committed below.

Respectfully submitted,

MARTIN A. MARTIN
118 East Leigh Street
Richmond 19, Virginia

CLARENCE W. NEWSOME
118 East Leigh Street
Richmond 19, Virginia

THURGOOD MARSHALL
CONSTANCE BAKER MOTLEY
JACK GREENBERG
10 Columbus Circle
New York 19, New York

Attorneys for Petitioner

APPENDIX

Judgment of the Supreme Court of Appeals

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 19th day of June, 1959.

The petition of Bruce Boynton for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 20th day of February, 1959, in a prosecution by the Commonwealth against Bruce Boyington, alias Bruce Boynton, for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said Hustings Court.

FILE COPY

Office Supreme Court, U.S.
FILED
JAN 14 1960
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

October Term, 1959

No. 1007

BRUCE BOYNTON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

A. S. HARRISON, JR.
Attorney General of Virginia

R. D. MCILWAINE, III
Assistant Attorney General

Supreme Court–State Library Building
Richmond 19, Virginia

January 14, 1960

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Prior Proceedings	2
Statement of Facts	2
The Statute	3
Questions Presented	4
Argument	4
Intercorporate Relationship	4
The Virginia Statute and the Interstate Commerce Clause	5
The Virginia Statute and the Fourteenth Amendment	9
Conclusion	10
Appendix	

TABLE OF CITATIONS

Cases

Bell v. Hagmann, 200 Va. 626, 107 S. E. (2d) 426	5
Commonwealth v. Castner, 138 Va. 81, 121 S. E. 894	5
Henderson v. United States, 336 U. S. 816	6
Morgan v. Virginia, 328 U. S. 373, 380	6
N.A.A.C.P. v. St. Louis—San Francisco Railway Co., 297 I.C.C. 335	6, 7
Sisk v. Town of Shenandoah, 200 Va. 277, 279, 105 S. E. (2d) 169	5
Williams v. Howard Johnson's Restaurant, 4 Cir., 268 F. (2d) 845	8

Other Authorities

	Page
Acts of Assembly of 1934, Chapter 165	5
Code of Virginia (1950):	
Section 8-264	5
Section 8-266	5
Section 18-225	2, 3, 4, 5, 7, 9, 10
Constitution of the United States:	
Article I, Section 8, Clause 3	4
Interstate Commerce Act, 49 U. S. C. A., Sections 1 et seq.	6

In the

Supreme Court of the United States

October Term, 1959

No. 409

BRUCE BOYNTON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

In a letter to the Attorney General of Virginia from the Honorable James R. Browning, Clerk of the Supreme Court of the United States, dated December 12, 1959, the Commonwealth of Virginia was requested to respond to the petition for writ of certiorari filed in the instant case and to "deal with the intercorporate relationship between the Trailways Bus Company and the Trailways Bus Terminal, Inc., set forth in any documents of which the Virginia courts can take judicial notice". Respondent was also requested to set forth her "view of the controlling Virginia law under which,

it is claimed, petitioner was convicted for trespass".* In accordance with the request contained in the above mentioned communication, written by the Clerk at the direction of this Court, the within brief of the respondent in opposition to the petition for writ of certiorari is filed.

PRIOR PROCEEDINGS

On January 6, 1959, petitioner was convicted in the Police Court of the City of Richmond, Virginia, for violation of Section 18-225 of the Code of Virginia (1950) as amended. He was sentenced to pay a fine of $10.00 and costs. Upon appeal to the Hustings Court of the City of Richmond, petitioner was again convicted and a similar sentence was imposed on February 20, 1959. A petition for writ of error to the judgment of the Hustings Court was denied by the Supreme Court of Appeals of Virginia on June 19, 1959, and the cause is currently before this Court upon petition for writ of certiorari to the Supreme Court of Appeals of Virginia, filed in the Supreme Court of the United States by the petitioner on September 15, 1959.

STATEMENT OF FACTS

On the night of December 20, 1958, the petitioner, a Negro student at the Howard University School of Law, was traveling via "Trailways" bus from Washington, D. C., to his home in Selma, Alabama. He boarded the bus in Washington, D. C., at 8:00 P. M., and arrived in Richmond, Virginia, about 10:40 P. M. Upon being informed by the driver of the bus that there would be a stopover of some forty minutes in Richmond, petitioner left the bus and entered the bus terminal building located at Ninth and Broad Streets in the City of Richmond (R. 31-33). Although

* Post, Appendix A.

noticing therein a separate restaurant for colored patrons which had seating capacity available (R. 33-34), petitioner entered the restaurant for white patrons, seated himself at a counter and requested service. He was advised—first by a waitress and then by the assistant manager of the restaurant—that separate facilities were maintained for persons of the Negro race and that he could be served in the restaurant reserved for colored patrons. Petitioner stated that he was an interstate passenger and was entitled to be served where he was. The assistant manager requested him to leave the premises and repair to the other restaurant. When petitioner refused to comply with this request, he was arrested, upon a warrant issued at the instance of the assistant manager, for trespass in violation of Section 18-225 of the Virginia Code (R. 22, 29-30, 34-36).

The bus terminal building in Richmond, Virginia, is operated by Trailways Bus Terminal, Inc., which company leases space therein to Bus Terminal Restaurant of Richmond, Inc. The lease in question grants Bus Terminal Restaurant of Richmond, Inc., exclusive authority to operate restaurant facilities in the terminal, and separate facilities for white and colored patrons are maintained by the lessee company (R. 21). The Record discloses that Bus Terminal Restaurant of Richmond, Inc., is "not affiliated in any way with the bus company", and that the bus company has "no control over the operation of the restaurant" (R. 21). Moreover, the restaurant facilities are "not necessarily" operated for bus passengers and have "quite a bit of business . . . from local people" (R. 26).

THE STATUTE

Under attack in the instant case is Section 18-225 of the Code of Virginia (1950) as amended, which statute in pertinent part provides:

"If any person shall without authority of law go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge of such land, or after having been forbidden to do so by sign or signs posted on the premises at a place or places where they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars or by confinement in jail not exceeding thirty days, or by both such fine and imprisonment."

QUESTIONS PRESENTED

1. Does Section 18-225 of the Virginia Code, as applied to petitioner in the case at bar, contravene Article I, Section 8, Clause 3, of the Constitution of the United States?

2. Does Section 18-225 of the Virginia Code, as applied to the petitioner in the case at bar, contravene the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

Intercorporate Relationship

In response to this Court's request that the Commonwealth "deal with the intercorporate relationship between the Trailways Bus Company and the Trailways Bus Terminal, Inc., set forth in any documents of which the Virginia courts can take judicial notice, respondent respectfully states that such relationship is not reflected in any documents of which the Virginia courts can take judicial notice. So far as respondent is aware, the only official documents, if any, which would contain evidence of the intercorporate relationship of corporations would be the records of the State Corporation Commission. Upon an examination of the Virginia law, counsel for respondent do not find that the Virginia courts can take judicial notice of such documents.

Under Virginia law, appellate courts will not even take judicial notice of the existence or contents of *legislative* charters of private corporations which were not relied upon in the court below. Section 8-264, Code of Virginia (1950); *Commonwealth* v. *Castner*, 138 Va. 81, 121 S. E. 894. Moreover, Section 8-266 of the Virginia Code establishes the procedure by means of which the existence and contents of records and papers in the office of the State Corporation Commission may be proved. In pertinent part, this statute provides:

> "A copy of any record or paper * * * (2) in the office of the State Corporation Commission, the State Board of Education, or the board of supervisors or other governing body of any county, attested by the secretary or clerk of such Commission or board; * * * may be admitted as evidence in lieu of the original. * * *
>
> "Any such copy purporting to be sealed, or sealed and signed, or signed alone, by any such officer, secretary or clerk, may be admitted as evidence, without any proof of the seal or signature, or of the official character of the person whose name is signed to it."

This provision of the Virginia Code prescribing the manner of proving certain specified documents and referring specifically to records and papers in the office of the State Corporation Commission negatives the authority of the Virginia courts to take judicial notice of such documents. See, *Sisk* v. *Town of Shenandoah*, 200 Va. 277, 279, 105 S. E. (2d) 169; *Bell* v. *Hagmann*, 200 Va. 626, 107 S. E. (2d) 426.

THE VIRGINIA STATUTE AND THE INTERSTATE COMMERCE CLAUSE

Section 18-225 of the Virginia Code first appeared as Chapter 165 of the Acts of the General Assembly of 1934.

Acts of Assembly (1934), Chapter 165, p. 248. With minor amendments not here material, the language of the existing statute is substantially identical to that contained in the original enactment. As is manifest from its terms, the statute does no more than impose criminal sanctions for continued trespass by an individual upon the lands or premises of another after proper warning and is entirely devoid of any racial connotation whatever.

Counsel for respondent respectfully submit that invocation of this statute by an agent of Bus Terminal Restaurant of Richmond, Inc., in the case at bar, presents no substantial question of conflict with the Commerce Clause of the Constitution of the United States. As pointed out by this Court in *Morgan* v. *Virginia*, 328 U. S. 373, 380, "the Constitution puts the ultimate power to regulate commerce in Congress", and Congress has exercised the power thus conferred by enactment of the Interstate Commerce Act. 49 U. S. C. A. 1 et seq. Moreover, in light of the provisions of Sections 3(1) and 316(d) of this Act*— which make it unlawful for any common carrier to make or give any undue or unreasonable preference or advantage to any person, or to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect—it is manifest that Congress has acted in the field of racial discrimination in interstate commerce and prohibited such discrimination to the extent deemed by it to be permissible or desirable. See, *Henderson* v. *United States*, 339 U. S. 816.

Equally manifest is it that the maintenance of racially separate restaurant facilities in a terminal building by a lessee non-carrier concern is not antagonistic to the provisions of the Interstate Commerce Act. The validity of this proposition was definitively established in *N.A.A.C.P.* v. *St. Louis*—

*49 U. S. C. A. 3(1); 49 U. S. C. A. 316(d); Post, Appendix B.

San Francisco Railway Co., 297 I. C. C. 335, in which case the Interstate Commerce Commission ruled that the maintenance of segregated lunch rooms, located in a railroad passenger station in Richmond, Virginia, by a lessee of the Richmond Terminal Railway Company was not violative of Section 3(1) of the Interstate Commerce Act. Indeed, in that case it was established—in contrast to the want of similar proof in the case at bar—that the defendant corporation, Richmond Terminal Railroad Company, which operated the terminal and leased the lunch room facilities to the Union News Company, was jointly controlled by the Richmond, Fredericksburg and Potomac and the Atlantic Coast Line railroad companies and was a carrier subject to the jurisdiction of the Commission.

The decision of the Interstate Commerce Commission in *N.A.A.C.P.* v. *St. Louis—San Francisco Railway Co., supra,* is clearly at variance with the instant petitioner's contention that the operation of separate restaurant facilities by Bus Terminal Restaurant of Richmond, Inc., constitutes a burden upon interstate commerce, and it is significant that petitioner does not here contend that Section 18-225 of the Virginia Code as applied to the circumstances of the case at bar violates any provision of the Interstate Commerce Act. Counsel for respondent submit that if, as shown above, the operation of racially separate restaurant facilities by a lessee non-carrier concern violates none of the comprehensive provisions of the Interstate Commerce Act or any of the manifold regulations of the Interstate Commerce Commission implementing and applying that Act, such action is not antagonistic to the Commerce Clause *per se.*

Finally, counsel for respondent submit that none of the decisions cited by petitioner is applicable to the situation which obtains in the instant case. These decisions were also

relied upon in *Williams* v. *Howard Johnson's Restaurant*, 4 Cir., 268 F. (2d) 845, in which case the petitioner contended that his exclusion from the Howard Johnson's Restaurant in the City of Alexandria, Virginia, on racial grounds amounted to discrimination against a person moving in interstate commerce and also interference with the free flow of commerce in violation of the Constitution of the United States. With respect to these decisions, the United States Court of Appeals for the Fourth Circuit declared (268 F. (2d) at 848):

> "The cases upon which the plaintiff relies in each instance disclosed discriminatory action against persons of the colored race by carriers engaged in the transportation of passengers in interstate commerce. In some instances the carrier's action was taken in accordance with its own regulations, which were declared illegal as a violation of paragraph 1, section 3 of the Interstate Commerce Act, 49 U.S.C.A. Sec. 3(1), which forbids a carrier to subject any person to undue or unreasonable prejudice or disadvantage in any respect, as in Mitchell v. United States, 313 U.S. 80, 61 S. Ct. 873; 85 L. Ed. 1201; and Henderson v. United States, 339 U. S. 816, 70 S. Ct. 843, 94 L. Ed. 1302. In other instances, the carrier's action was taken in accordance with a state statute or state custom requiring the segregation of the races by public carriers and was declared unlawful as creating an undue burden on interstate commerce in violation of the commerce clause of the Constitution, as in Morgan v. Com. of Virginia, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317; Williams v. Carolina Coach Co., D. C. Va., 111 F. Supp. 329, affirmed 4 Cir., 207 F. 2d 408; Flemming v. S. C. Elec. & Gas Co., 4 Cir., 224 F. 2d 752; and Chance v. Lambeth, 4 Cir., 186 F. 2d 879.
>
> "*In every instance the conduct condemned was that of an organization directly engaged in interstate* com-

merce and the line of authority would be persuasive in the determination of the present controversy *if it could be said that the defendant restaurant was so engaged.* We think, however, that the cases cited are not applicable because we do not find that a restaurant is engaged in interstate commerce *merely because in the course of its business of furnishing accommodations to the general public it serves persons who are traveling from state to state.* As an instrument of local commerce, the restaurant is not subject to the constitutional and statutory provisions discussed above and, thus, is at liberty to deal with such persons as it may select." (Italics supplied)

THE VIRGINIA STATUTE AND THE FOURTEENTH AMENDMENT

Petitioner has devoted less than a page of his petition for writ of certiorari to the contention that Section 18-225 of the Virginia Code, as applied to him in the instant case, violates the Fourteenth Amendment to the Constitution of the United States, and counsel for respondent submit that little consideration need be accorded it here. All that we could wish to say upon this question has already been stated by Judge Soper, speaking for the United States Court of Appeals for the Fourth Circuit, in *Williams* v. *Howard Johnson's Restaurant, supra.* In that case, the petitioner—in addition to asserting that his exclusion from the Howard Johnson's Restaurant in question on racial grounds contravened the Commerce Clause—also contended that such exclusion constituted a violation of the Civil Rights Act of 1875. Noting that the dismissal of petitioner's complaint by the United States District Court for the Eastern District of Virginia "was in accord with the decisions of the Supreme Court of the United States, and other Federal courts", Judge Soper observed (268 F. (2d) at 847-848):

"[Petitioner] points, however, to statutes of the state which require the segregation of the races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage; he emphasizes the long established local custom of excluding Negroes from public restaurants and he contends that the acquiescence of the state in these practices amounts to discriminatory state action which falls within the condemnation of the Constitution. The essence of the argument is that the state licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities.

"This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices. *Unless these actions are performed in obedience to some positive provision of state law* they do not furnish a basis for the pending complaint. The license laws of Virginia do not fill the void. Section 35-26 of the Code of Virginia, 1950, makes it unlawful for any person to operate a restaurant in the state without an unrevoked permit from the Commissioner, who is the chief executive officer of the State Board of Health. The statute is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served. *The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment.*" (Italics supplied)

CONCLUSION

In light of the foregoing, counsel for respondent respectfully submit that Section 18-225 of the Virginia Code, as applied to the petitioner in the case at bar, presents no serious

question of conflict with the Commerce Clause of the Constitution of the United States or the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

A. S. HARRISON, JR.
Attorney General of Virginia

R. D. MCILWAINE, III
Assistant Attorney General

Supreme Court–State Library Building
Richmond 19, Virginia

January 14, 1960

APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON 25, D. C.

December 12, 1959

Honorable A. S. Harrison, Jr.
Attorney General of Virginia
Richmond, Virginia

Re: Boynton v. Virginia
No. 409, October Term, 1959

Dear Sir:

On instructions from this Court, I am writing to ask if the Commonwealth of Virginia will be good enough to respond to the petition in the above case and, included in its response, deal with the intercorporate relationship between the Trailways Bus Company and the Trailways Bus Terminal, Inc., set forth in any documents of which the Virginia courts can take judicial notice. Compare *Henderson* v. *United States*, 339 U. S. 816.

It is further requested that you set forth your view of the controlling Virginia law under which, it is claimed, petitioner was convicted for trespass.

Very truly yours,

James R. Browning, Clerk

By (s) R. J. Blanchard
R. J. Blanchard
Deputy

RJB:vmg

APPENDIX B

49 U. S. C. A. 3(1)

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

49 U. S. C. A. 316(d)

All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or

disadvantage in any respect whatsoever: *Provided, however*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 7

BRUCE BOYNTON,

Petitioner,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR PETITIONER

MARTIN A. MARTIN
148 East Leigh Street
Richmond 19, Virginia

CLARENCE W. NEWSOME
118 East Leigh Street
Richmond 19, Virginia

THURGOOD MARSHALL
JACK GREENBERG
10 Columbus Circle
New York 19, New York

Attorneys for Petitioner

[illegible] H. POLLAK
CONSTANCE BAKER MOTLEY
Of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	3
Summary of Argument	5
Argument	6
Introductory	6
The statute involved	6
Issues presented by the statute as applied	8
I. The decisions below conflict with principles established by decisions of this Court by denying petitioner, a Negro, a meal in the course of a regularly scheduled stop at the restaurant terminal of an interstate motor carrier and by convicting him of trespass for seeking nonsegregated dining facilities within the terminal	14
II. Petitioner's criminal conviction which served only to enforce the racial regulation of the bus terminal restaurant conflicts with principles established by decisions of this Court, and thereby violates the Fourteenth Amendment	22
Conclusion	26

Table of Cases

	PAGE
Barrows v. Jackson, 346 U.S. 249	11
Bibb v. Navajo Freight Lines, 359 U.S. 520	15
Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28	21
Bolling v. Sharpe, 347 U.S. 497	21
Boman v. Birmingham Transit Co., No. 18187, July 12, 1960, Fifth Circuit	12, 18, 24
Boykin v. State, 40 Fla. 484, 24 So. 141 (1898)	8
Breard v. Alexandria, 341 U.S. 622	10, 25
Chance v. Lambeth, 186 F.2d 879 (4th Cir. 1951), cert. den., 341 U.S. 941	12, 17
Commonwealth v. Israel, 31 Va. (4 Leigh) 675 (Va. Gen. Ct., 1833)	7
Commonwealth v. Richardson, 313 Mass. 632, 48 N.E. 2d 678 (1943)	8
Re Debs, 158 U.S. 564	16
Dye v. Commonwealth, 48 Va. (7 Grat.) 662 (Va. Gen. Ct., 1851)	7
Falkingham v. Fregon, 25 V.L.R. 211, 21 A.L.T. 123 (1899)	9
Freeman v. Retail Clerks Union, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959)	12
Greenaway v. Hunt and Weggery [1922] N.Z.L.R. 53 [1921], G.L.R. 673	9
Gripps v. Gripps, 20 Tas. L.R. 47 (1924)	9
Hall v. Commonwealth, 188 Va. 72, 49 S.E.2d 369 (1948), app. dism. 335 U.S. 875	6
Hall v. DeCuir, 95 U.S. 485	16
Henderson v. Commonwealth, 49 Va. (8 Grat.) 708 (Va. Gen. Ct., 1852)	7

PAGE

Henderson v. United States, 339 U.S. 816 ..... 15, 19, 20

James v. Butler, 25 N.Z.L.R.C.A. 653 (1906) 9
Jones v. United States, —— U.S. —— (1960) 13

Keys v. Carolina Coach Co., 64 M.C.C. 769 (1955) 20
Kirschenbaum v. Walling, 316 U.S. 517 16

Marsh v. Alabama, 326 U.S. 501 ..... 10, 12, 24
Martin v. Struthers, 319 U.S. 141 10
Maryland v. Williams, 44 Lab. Rel. Ref. Man. 2357 (1959) 11
Miller v. Harless, 153 Va. 228, 149 S.E. 619 (1929) 7
Mitchell v. United States, 313 U.S. 80 19
Morgan v. Virginia, 328 U.S. 373 ..... 14, 15, 19, 20, 21
Murphey v. State, 115 Ga. 201, 41 S.E. 685 (1902) 8
Myers v. State, 190 Ind. 269, 130 N.E. 116 (1921) 8, 9

N.L.R.B. v. American Pearl Button Co., 149 F.2d 258 (8th Cir. 1945) 11
N.L.R.B. v. Fansteel Metal Corp., 306 U.S. 240 (1948) 12, 25
N.Y. N.H. & H. R. Co. v. Nothnagle, 346 U.S. 128 16

People v. Barisi, 193 Misc. 934, 86 N.Y.S.2d 277 (1948) 12
People v. Miller, 344 Ill. App. 574, 101 N.E.2d 874 (1951) 9
People v. Stevens, 109 N.Y. 159, 16 N.E. 53 (1888) 8

R. v. Blake, et al., 3 Burr. 1731, 47 E.R. 1070 (1765) 9
R. v. Phiri (4) S.A. 708 (T) (1954) 9
R. v. Storr, 3 Burr. 1698, 97 E.R. 1053 (1765) 7, 9
R. v. Wilson, 8 Term Rep. 357, 101 E.R. 1432 (Kingston Assizes, 1799) 9
Republic Aviation, Inc. v. N.L.R.B., 324 U.S. 793 ..... 11, 25

PAGE

Rex v. Storr, 3 Burr. R. 1698 7
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 16
Ryan v. Stanford, 15 N.Z.L.R.C.A. 390 (1897) 9

Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604 21
Shelley v. Kraemer, 334 U.S. 1 ..... 11, 22
Southern Pacific Co. v. Arizona, 325 U.S. 761 ..... 14, 19
Sprout v. South Bend, 277 U.S. 163 16
Stafford v. Wallace, 258 U.S. 495 15
State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958) . 9
State v. Cockfield, 15 Rich. (49 S.C.L.) 53 (1867) 9
State v. Larason, 72 Ohio L. Abs. 211, 143 N.E.2d 502 (1956) 9

United States v. Yellow Cab Co., 332 U.S. 218, 228 16
United Steelworkers v. N.L.R.B., 243 F.2d 593 (D.C. Cir. 1956) (reversed on other grounds) 357 U.S. 357 ..... 11, 25

Whiteside v. Southern Bus Lines, 177 F.2d 949 (6th Cir. 1949) 12, 17
Wiggins v. State, 119 Ga. 216, 46 S.E. 86 (1903) 8
Williams v. Howard Johnson Restaurant, 268 F.2d 845 (4th Cir., 1959) 23
Wise v. Commonwealth, 98 Va. 837, 36 S.E. 479 (1900) 7

UNITED STATES STATUTES AND CONSTITUTIONAL PROVISIONS

United States Constitution, Article I, Sec. 8, cl. 3 ..... 2, 8, 12, 13

United States Constitution, Fourteenth Amendment 2

28 U.S.C. Sec. 1257(3) 2

PAGE

49 U.S.C. Sec. 3(1) 19

49 U.S.C. Sec. 303(19) 20

49 U.S.C. Sec. 316(d) 5, 19

STATE STATUTES

Alabama Code 1940, Title 14, Sec. 426 9

Alaska Laws Annot., 1958, Sec. 65-5-112 9

Arkansas Rev. Stats., 1959, Secs. 71-1801, 1802, 1803 9

California, West's Code Annot., 1958, Tit. 14, Sec. 602 8

Connecticut, Gen. Stats. Rev., 1958, Sec. 53-103 9

Delaware Code Annot., 1953, Tit. 11, Sec. 871 9

District of Columbia Code Annot., 1956, Sec. 22-3102. 9

Florida, West's Stats. Annot., 1948, Tit. 44, Sec. 821.01 8

Georgia Annot. Code, 1959, Sec. 26-3002 8

Hawaii Rev. Laws, 1955, Sec. 312-1 9

Illinois Rev. Stats., 1959, Tit. 38, Sec. 565 8

Indiana, Burns Stats. Annot., 1956, Tit. 10, Sec. 4506 8

Kentucky Rev. Stats., 1959, Sec. 433-380 8

Maine Rev. Stats., 1959, c. 131, Sec. 39 8

Maryland Annot. Code, 1957, Art. 27, Sec. 577 8

Massachusetts, Michie's Annot. Laws, C. 266, Sec. 120 8

Michigan Stats. Annot., 1954, Sec. 28-820(1) 9

Minnesota Stats. Annot., 1947, Sec. 621.57 9

Mississippi Annot. Code, 1942, Tit. 11, Sec. 2411 8

PAGE

Nebraska Rev. Stats., 1957, Tit. 28, Sec. 589 8

Nevada Rev. Stats., 1957, Sec. 207.200 9

New Hampshire Rev. Stats. Annot., 1955, Sec. 572:50 9

New Jersey Annot. Stats., 1957, Tit. 2A, Sec. 170-31 8

New York, McKinney Laws, Art. 182, Sec. 2036 8

North Carolina Gen. Stats., Tit. 14, Sec. 134 9

Ohio, Page's Rev. Code Annot., Sec. 2902.21 8

Oklahoma, West's Stats. Annot., 1958, Tit. 21, Sec. 1353 8

Oregon Rev. Stats., Sec. 164.460 9

South Carolina Code of Laws, 1959, Sec. 16-386 9

Virginia Code Sec. 18-225 ..... 1, 2, 4, 8

Washington Rev. Code, 1957, Sec. 8.83.060 9

West Virginia Code, 1955, Sec. 5974 8

Wyoming, Michie's Stats. Annot., 1957, Sec. 6-226 9

STATUTES OF COMMONWEALTH COUNTRIES

Natives (Urban Areas) Consolidation Act of 1945, Sec. 9, para. 9, as provided by Sec. 29, para. e of Native Laws Amendment Act No. 36 of 1957 (South Africa) 9

New Zealand, Police Offences Amendment Act (No. 2) No. 43 of 1952, Sec. 3 9

Prevention of Illegal Squatting Act, No. 52 of 1951, Sec. 1 (South Africa) 9

72 South Af. L.J. 125 (1955) 9

PAGE

Tasmania, Trespass to Lands Act, 1862 9

Victoria, Australia, Police Offences Act, No. 6337 of 1958, Sec. 20 9

OTHER AUTHORITIES

63 C.J.S. 1075 7

72 South Af. L.J. 125 (1955) 9

H.B. 1112, Act No. 497, 1960 General Assembly of Georgia 8

Hitchcock's Mass Transportation Directory (1959-60 ed.) 205, 242 22

Op. Atty. Gen. of Florida 649, 1953-54 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 7

BRUCE BOYNTON,

Petitioner,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR PETITIONER

Opinions Below

No opinion was rendered in this case by the Supreme Court of Appeals of Virginia when it denied the petitioner a writ of error to the judgment of the Hustings Court of the City of Richmond on the 19th day of June, 1959. No opinion was rendered by the Hustings Court of the City of Richmond on the 20th day of February, 1959, when it found petitioner guilty of a violation of §18-225 of the Code of Virginia, 1950, as amended.

Jurisdiction

The judgment of the Supreme Court of Appeals of Virginia was rendered on the 19th day of June, 1959 and

stay of execution and enforcement of the judgment of said Court was granted on the 24th day of July, 1959 staying the execution and enforcement of same until the 17th day of September, 1959, unless the case would before that time be docketed in this Court in which event enforcement of said judgment should be stayed until the final determination of this case by this Court. On February 23, 1960, this Court granted a petition for writ of certiorari from the Supreme Court of Appeals of the Commonwealth of Virginia. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

Questions Presented

1.

Whether the criminal conviction of plaintiff, an interstate traveler, for refusing to leave an interstate bus terminal restaurant where he sought refreshment at a regularly scheduled stop in the course of his interstate journey and was barred solely because of his race, is invalid as a burden on interestate commerce in violation of Article I. §8, Clause 3 of the United States Constitution.

2.

Whether said conviction violates the due process and equal protection clauses of the I4th Amendment to the Constitution of the United States.

Constitutional and Statutory Provisions Involved

This case involves:

Article I, §8, and the due process and equal protection clauses of the XIV Amendment of the Constitution of the United States.

§18-225 of the Code of Virginia of 1950. This statutory provision is set forth in the Statement, *infra*, p. 4.

Statement

At 10:40 P. M. on December 20th, 1958, Bruce Boynton, petitioner, stepped off a Trailways bus from Washington, D. C., at the Trailways Bus Terminal in Richmond, Va., for a forty minute layover. Petitioner, a Negro student at the Howard University School of Law in Washington, was hungry and anxious to get something to eat before reboarding the bus to continue on to his home in Selma, Alabama, by way of Montgomery (R. 27-28).

He first looked into a small restaurant and noticed that it was crowded with colored patrons. Since his time was limited, he went on to another restaurant within the terminal, which was practically empty, adjacent to the waiting room (R. 28). He entered and sat on a vacant stool at the counter. A white waitress immediately approached and informed him that she had orders not to serve people of his race. She advised him to use the colored facilities. Petitioner explained that he would like to be served before his bus, which was scheduled to leave shortly, departed. To insure quick service he ordered a prepared sandwich and a cup of tea. But the waitress disregarded his order, departed for a while and returned to repeat that it was customary not to serve Negroes in that particular restaurant (R. 29).

Petitioner asked to speak to someone who could wait on him, pointing out that he was an interstate passenger with a cross-country ticket purchased in Washington, D. C. (R. 29). At this point the assistant manager intervened "to explain to him the situation" (R. 21) and to demand that petitioner leave. Petitioner refused to move. The assistant manager's response was to have petitioner arrested (R. 21, 29). Petitioner's baggage was removed from the bus on which he had expected to continue his journey, and peti-

tioner himself was taken away in a patrol wagon, charged with a violation of §18-225 of the Code of Virginia of 1950 as amended, which provides:

> "If any person shall without authority of law go upon or remain upon the lands or premises of another after having been forbidden to do so by the owners, lessee, custodian or other person lawfully in charge of such land, or after having been forbidden to do so by sign, or signs posted on the premises at a place or places where they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $100.00 or by confinement in jail not exceeding thirty days, or by both such fine and imprisonment."

The bus terminal was owned and operated by Trailways Bus Terminal, Inc. (R. 9-17). The restaurants therein were built into the terminal upon its construction and leased by Trailways to Bus Terminal Restaurant of Richmond, Inc. (R. 9-17). The lease gave exclusive authority to the lessee to operate restaurants in the terminal, required that they be conducted in a sanitary manner, that sufficient food and personnel be provided to take care of the patrons, that prices be just and reasonable, that equipment be installed and maintained to meet the approval of Trailways, that lessee's employees be neat and clean and furnish service in keeping with service furnished in an up-to-date, modern bus terminal; prohibited the sale of alcoholic beverages on the premises; and permitted cancellation of the lease upon the violation of any of its conditions (R. 9-17).

Petitioner was convicted in the Police Court of the City of Richmond and fined $10.00, which conviction was appealed to the Hustings Court of the City of Richmond

which affirmed (R. 31).[1] Petition for writ of error to the Supreme Court of Appeals was rejected, the effect of which was to affirm the judgment of the Hustings Court (R. 32). The affirmance by the Supreme Court of Appeals of Virginia, appears in the Record at p. 32. In the Hustings Court of the City of Richmond petitioner objected to the criminal prosecution on the grounds that it contravened his rights under the Commerce Clause of the United States Constitution (Article 1, Section 8) and the Interstate Commerce Act (Title 49 U.S.C., Section 316(d)) and that he was thereby denied due process and equal protection of the laws secured by the Fourteenth Amendment to the United States Constitution (R. 6-7). Said objections were renewed by notice of appeal and assignment of error to the Supreme Court of Appeals of Virginia (R. 5). These defenses, however, as aforesaid, were rejected at all stages of the litigation without opinion. On February 23, 1960 this Court granted petitioner's petition for writ of certiorari to the Supreme Court of Appeals of Virginia.

Summary of Argument

The arrest and conviction of petitioner burdened interstate commerce. That the terminal in question is stationary does not exempt the burden there effected from the general rule. Even if petitioner's arrest and conviction for insisting upon nonsegregated dining service might somehow be viewed as "private action," the Commerce Clause also forbids privately imposed burdens on interstate com-

---

[1] Petitioner, at the time of arrest, was a law student at Howard University. Since then he has been graduated, and on February 16, 1960, took the Alabama bar examination. While others who took the examination with him already have been admitted to the bar, petitioner's status has not yet been declared. He is under an investigation, he has been informed, which concerns this conviction.

merce. But the arrest and conviction here supply requisite state action should that be required. Congress has expressed no specific intent concerning an arrest and conviction like petitioner's, but should congressional intent be found in the Motor Carriers Act, that Act, read in a context of relevant constitutional law, indicates intent that this burden not be permitted.

Judicial enforcement of private racial discrimination violates the 14th Amendment. This has been made clear, among other places, in cases of arrest for exercise of constitutional rights in public places although possessory interest to these places actually may lie with private individuals, or corporations. Petitioner's conviction is not a reasonable exercise of police power necessary to maintain law and order. In fact, petitioner's act would not have been criminal at common law, in almost all of the other states of the Union, in England, or in the Commonwealth countries, except South Africa where similar law is directed solely at Natives.

Argument

Introductory

The statute involved

Virginia's police, in the circumstances related above, by application of a trespass statute, have halted petitioner's interstate journey, forced him to disembark and remove his baggage from the interstate bus which carried him from Washington, D. C. en route to his home in Alabama, and have brought him before the Virginia courts which have adjudged him guilty of crime. The statute is set forth *supra*, p. 4.

This statute apparently has been interpreted by the Virginia courts but once. *Hall* v. *Commonwealth*, 188 Va.

72, 49 S.E. 2d 369 (1948), app. dism. 335 U.S. 875, upheld its applicability to Jehovah's Witnesses who persisted in going past the receptionist of a private apartment house into its corridors to solicit tenants, contrary to regulations, concurred in by tenants and management, which required invitation of a tenant for permission to enter the hallways. The Supreme Court of Virginia, holding the regulation "valid and reasonable," 188 Va. at 90, 49 S.E.2d at 378, ruled that state and federal constitutional rights of free speech, press, and assembly had not been denied.

There are other Virginia trespass cases, involving similar, earlier statutory law, and statements of the common law of Virginia, which help further place this statute in a context of the State's law. The general rule seems to be, as at English common law, that an intrusion made under claim of right, which may give rise to civil suit, is not a misdemeanor. *Wise* v. *Commonwealth*, 98 Va. 837, 36 S.E. 479 (1900); *Dye* v. *Commonwealth*, 48 Va. (7 Grat.) 662 (Va. Gen. Ct., 1851); and that before criminal liability attaches there must be a breach of the peace, *Henderson* v. *Commonwealth*, 49 Va. (8 Grat.) 708 (Va. Gen. Ct., 1852);[2] *Commonwealth* v. *Israel*, 31 Va. (4 Leigh) 675 (Va. Gen. Ct., 1833); *Miller* v. *Harless*, 153 Va. 228, 149 S.E. 619 (1929).[3]

---

2 See *Henderson* v. *Commonwealth*, 49 Va. (8 Grat.) 708, 710 (Va. Gen. Ct., 1852): "It is abundantly clear that the mere breaking and entering the close of another, though in contemplation of law a trespass committed *vi et armis*, is only a civil injury to be redressed by action: and cannot be treated as a misdemeanor to be vindicated by indictment or public prosecution. But when it is attended by circumstances constituting a breach of the peace, such as entering the dwelling house with offensive weapons, in a manner to cause terror and alarm to the family and inmates of the house, the trespass is heightened into a public offense, and becomes the subject of a criminal prosecution." Citing *Rex* v. *Storr*, 3 Burr. 1698. See statement of the general rule in 63 C.J.S. 1075, to the same effect.

3 In many states there apparently are no statutes under which Boynton would have been convicted for trespass: See Arizona, Colorado, Idaho, Iowa, Kansas, Louisiana, Missouri, Montana, New Mexico, North Dakota, Pennsyl-

But, as indicated above, such holdings have not been employed by Virginia in its sole interpretation of §18-225.

Issues Presented by the Statute as Applied

Petitioner raises two principal constitutional defenses, the Commerce Clause (Article I, §8, cl. 3), and the Equal Protection and Due Process Clauses (Fourteenth Amendment), against the asserted power of Virginia to convict him under this statute in the circumstances of his interstate

---

vania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, and Wisconsin. *Cf.* the following states where statutes probably would not be applicable to Boynton's acts: California, West's Code Annot., 1955, Tit. 14, Sec. 602, para. 1 (entering and occupying structures); Kentucky, Rev. Stats., 1959, Sec. 433.380 (trespass hindering conduct of commerce); Maine, Rev. Stats., 1959, c. 131, Sec. 39 (willful entry on land commercially used, but referring to land without buildings); Maryland, Annot. Code, 1957, Art. 27, Sec. 577 (wanton entry after warning involving high degree of criminal intent); Mississippi, Annot. Code, 1942, Tit. 1., Sec. 2411 (remaining on inclosed land of another after warning); Nebraska Rev. Stats., 1956, Tit. 28, Sec. 589 (refusal to depart from enclosure after request); New Jersey, Annot. Stats., 1951, Tit. 2A, Sec. 170-31 (trespass on lands; totally rural context); Oklahoma, West's Stats. Annot., 1958, Tit. 21, Sec. 1353 (intrusion on lot or piece of land; not in sense of buildings); and West Virginia, Code, 1955, Sec. 5974 (entry upon inclosed lands after being forbidden).

In other states where perhaps applicable trespass laws do exist, it is questionable whether under existing interpretations he would have been convicted, for clearly he was in the Trailways Terminal under a claim of right, which ordinarily exempts the intrusion from the category of criminal trespass. There are no reported cases in these states which would differentiate between a claim of constitutional or other federal right and one of traditional "property" right. Such differentiation would, of course, raise constitutional questions of equal protection. See Florida, West's Stats. Annot., 1944, Tit. 44, Sec. 821.01 as interpreted in *Boykin* v. *State*, 40 Fla. 484, 24 So. 141 (1898) and 1953-54 Op. Atty. Gen. 649. In Georgia, until recently the law was stated by: Georgia, Annot. Code, 1959, Sec. 26-3002 as interpreted in *Murphey* v. *State*, 115 Ga. 201, 41 S.E. 685 (1902) and *Wiggins* v. *State*, 119 Ga. 216, 46 S.E. 86 (1903); this now has been superseded by H.B. 1112, Act No. 497, 1960 General Assembly (trespass after refusal to leave); Indiana, Burns Stats. Annot., 1956, Tit. 10, Sec. 4506 as interpreted in *Myers* v. *State*, 190 Ind. 269, 130 N.E. 116 (1921); Massachusetts, Michie's Annot. Laws, C. 266, Sec. 120 as interpreted in *Commonwealth* v. *Richardson*, 313 Mass. 632, 48 N.E.2d 678 (1943); New York, McKinney Laws, Art. 182, Sec. 2036 interpreted in *People* v. *Stevens*, 109 N.Y. 159, 16 N.E. 53 (1888); Ohio, Page's Rev. Code Annot.

journey related above. This conflict manifests once more the recurring theme which juxtaposes in the courts claims of federally protected personal liberty against state en-

---

Sec. 2902.21 as interpreted in *State* v. *Largson*, 72 Ohio L. Abs. 211, 143 N.E.2d 502 (1956); and Wyoming, Michie's Stats. Annot., 1957, Sec. 6-226 applying Indiana cases, see *Myers* v. *State*, *supra*, since derived from Indiana statute.

Cf. Alabama, Code, 1940, Title 14, Sec. 426 and "legal cause or good excuse" and Illinois Rev. Stats., 1959, Tit. 38, Sec. 565 as interpreted in *People* v. *Miller*, 344 Ill. App. 574, 101 N.E.2d 874 (1951). In several states the problem of the defense of claim of right has not received judicial consideration; as to these states it may be argued that the common law defense of bona fide, reasonable claim of right would be upheld if asserted. See Alaska, Laws Annot., 1958, Sec. 65-5-112; Connecticut, Gen. Stats. Rev., 1958, Sec. 53-103; District of Columbia, Code Annot., 1956, Sec. 22-3102; Hawaii, Rev. Laws, 1955, Sec. 312-1; Michigan, Stats. Annot., 1954, Sec. 28.820(1); Minnesota, Stats. Annot., 1947, Sec 621.57; Nevada, Rev. Stats., 1957, Sec. 207.200; New Hampshire, Rev. Stats. Annot., 1955, Sec. 572:50; Oregon, Rev. Stats., Sec. 164.460; and Washington, Rev. Code, 1957, Sec. 9.83.060.

In the following states Boynton would probably have been found guilty: Arkansas, Rev. Stats., 1959, Secs. 71-1801, 1802, 1803 (emergency acts designed specifically to counteract sit-in situations); Delaware, Code Annot., 1953, Tit. 11, Sec. 871 (claim of ownership only defense); North Carolina, Gen. Stats., Tit. 14, Sec. 134 as interpreted in *State* v. *Clyburn*, 247 N.C. 455, 101 S.E.2d 295 (1958); and South Carolina, Code of Laws, 1959, Sec. 16-386 (originally directed at Negroes after Civil War, see *State* v. *Cookfield*, 15 Rich. (49 S.C.L.) 53 (1867)).

In England and the Commonwealth countries, Boynton's deed would not have been a crime; see cases requiring breach of peace or use of actual force to make trespass indictable, *R.* v. *Storr*, 3 Burr. 1698, 97 E.R. 1053 (1765); *R.* v. *Blake et al.*, 3 Burr. 1731, 47 E.R. 1070 (1765); and *R.* v. *Watson*, Term Rep. 357, 101 E.R. 1432 (Kingston Assizes, 1789); except in South Africa where the relevant statute specifically is directed at the Natives. See Natives (Urban Areas) Consolidation Act of 1945, Sec. 9, para. 9, as provided by Sec. 29, para. e of Native Laws Amendment Act, No. 36 of 1957. *Cf.* also Prevention of Illegal Squatting Act, No. 52 of 1951, Sec. 1 with interpretation thereof in *R.* v. *Phiri* (4) S.A. 708 (T) (1954) and commentary thereon in 72 South Af. L.J. 125 (1955). The only other Commonwealth countries in which Boynton might have been tried probably would have acquitted him on the basis of his defense of entry under a bona fide claim of right: See New Zealand, Police Offences Amendment Act (No. 2) No. 43 of 1952, Sec. 3 as interpreted in *Ryan* v. *Stanford*, 15 N.Z.L.R.C.A. 390 (1897), *James* v. *Butler*, 25 N.Z.L.R.C.A. 653 (1906) and *Greenaway* v. *Hunt and Heggery* [1922] N.Z.L.R. 55 [1921], G.L.R. 673; Victoria, Australia, Police Offences Act, No. 6337 of 1958, Sec. 20 as interpreted in *Falkingham* v. *Fregon*, 25 V.L.R. 211, 21 A.L.T. 123 (1899); and Tasmania, Trespass to Lands Act, 1862, as interpreted in *Gripps* v. *Gripps*, 20 Tas. L.R. 47 (1924).

forcement of alleged private property right, by criminal law or otherwise. Or, to rephrase the matter, the problem is one of how far certain claimed private property rights extend. Such controversy, in recent years, has arisen in various forms.

Where Jehovah's Witnesses were convicted of trespass for having distributed literature on the premises of a company-owned town contrary to the wishes of the town's management, *Marsh* v. *Alabama*, 326 U.S. 501, Mr. Justice Black, for the Court, wrote that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional right of those who use it. . . ." at p. 506 and "[w]hen we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position," at p. 509. Conviction was reversed. In *Martin* v. *Struthers*, 319 U.S. 141, this Court held unconstitutional an ordinance which made unlawful ringing doorbells of residences for the purpose of distributing handbills, upon considering the free speech values involved—"[d]oor to door distribution of circulars is essential to the poorly financed causes of little people," at p. 146—and that the ordinance precluded individual private householders from deciding whether they desired to receive the message. But in effecting "an adjustment of constitutional rights in the light of the particular living conditions of the time and place", *Breard* v. *Alexandria*, 341 U.S. 622, 626, the Court, assessing a conviction for door-to-door commercial solicitation involving various popular magazines, contrary to a "Green River" ordinance, concluded that the community "speak[ing] for the citizens," 341 U.S. 644, might convict for crime in the nature of trespass. The decision turned

upon balance of the "conveniences between some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results." 341 U.S. at 644. Because, among other things, "[s]ubscription may be made by anyone interested in receiving the magazines without the annoyances of house to house canvassing," *ibid.*, the judgment was affirmed.

The ordinarily unchallenged right of real property owners to fasten covenants on their land has been circumscribed to the extent that the Fourteenth Amendment prohibits enforcing of racial restrictive covenants by injunction, *Shelley* v. *Kraemer*, 334 U.S. 1, or damages, *Barrows* v. *Jackson*, 346 U.S. 249.

A like collision between federal rights, this time conferred by the National Labor Relations Act, and rights in real property defined by state law, also has called for reconciliation in this Court. *Republic Aviation, Inc.* v. *N. L. R. B.*, 324 U.S. 793, upheld the validity of National Labor Relations Board rulings that, lacking special circumstances that might make such rules necessary, employer regulations forbidding all union solicitation on company property regardless of whether the workers were on their own or company time, constituted unfair labor practices. In assessing the regulations, Justice Reed balanced the employer's right to maintain discipline with the employees' right to organize; no weight was given to the employer's property right, mentioned solely at 324 U.S. 802, note 8.[4] Similarly a Baltimore City Court, *State of Maryland* v. *Williams*, 44 Lab. Rel. Ref.

[4] See also *N.L.R.B.* v. *American Pearl Button Co.*, 149 F.2d 258 (8th Cir., 1945); *United Steelworkers* v. *N.L.R.B.*, 243 F.2d 593, 598 (D.C. Cir., 1956) (reversed on other grounds) 357 U.S. 357. ("Our attention has not been called to any case under the Wagner Act or its successor in which it has been held that an employer can prohibit either solicitation or distribution of literature by employees simply because the premises are company property.

Man. 2357, 2361 (1959) has on Fourteenth Amendment and Labor Management Relations Act grounds, decided that pickets may patrol property within a privately owned shopping center.[5]

The Commerce Clause too has been interposed by the courts between private proprietors of interstate carriers and passengers who resisted racial segregation on those carriers by rule of the management. *Whiteside* v. *Southern Bus Lines*, 177 F.2d 949 (6th Cir., 1949); *Chance* v. *Lambeth*, 186 F.2d 879 (4th Cir., 1951), cert. den., 341 U.S. 941. And the Fourteenth Amendment forbids police to arrest those who violate an intrastate carrier's private racial seating regulation, where to violate management's seating rule is a crime. The statute did not mention race. *Boman* v. *Birmingham Transit Co.*, No. 18187, July 12, 1960, Fifth Circuit.

In such cases the approach of the courts has been infused with an awareness, as Mr. Justice Frankfurter wrote, concurring in *Marsh* v. *Alabama*, 326 U.S. 501, 510, that "when decisions by State courts involving local matters are so interwoven with the decision of the question of Constitutional rights that the one necessarily involves the other,

---

Employees are lawfully within the plant, and nonworking time is their own time. If Section 7 activities are to be prohibited, something more than mere ownership and control must be shown.")

Compare *N.L.R.B.* v. *Fansteel Metal Corp.*, 306 U.S. 240, 252 (employees seized plant; discharge held valid: "high-handed proceeding without shadow of legal right").

5 See also *People* v. *Barisi*, 193 Misc. 934, 86 N.Y.S.2d 277, 279 (1948) (picketing within Pennsylvania Station not trespass; owners have opened it to public and their property rights are 'circumscribed by the constitutional rights of those who use it.'"); *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man 2334 (1959) (shopping center owner denied relief against picketers on is property; relying on Fourteenth Amendment).

State determination of local questions cannot control the Federal Constitutional right."[6]

Therefore, here, the essential right of the management of the Trailways Terminal restaurant to enforce segregation of interstate passengers by means of the full force of the Commonwealth of Virginia, asserted through its police and courts, must be weighed against the claim of petitioner, an interstate traveler, to freedom of movement without being hobbled by racial distinction in the course of an interstate journey (Article 1, §8), and his further claim to be free of arrest and conviction in the Virginia courts in the enforcement of such racial rules (Fourteenth Amendment). Petitioner submits that under our Constitution this conflict can be resolved only in the interest of freedom of movement among the states and freedom from criminal conviction in the state courts to enforce racial discrimination.

---

[6] For a related conclusion in a different constitutional context see, *Jones v. United States*, —— U.S. ——, —— (1960) ("... it is unnecessary and ill-advised to impart into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. ... Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." 4 L.ed.2d 697 at 705.

I.

The decisions below conflict with principles established by decisions of this Court by denying petitioner, a Negro, a meal in the course of a regularly scheduled stop at the restaurant terminal of an interstate motor carrier and by convicting him of trespass for seeking nonsegregated dining facilities within the terminal.

In this context we approach petitioner's first contention that his arrest and conviction disrupted his interstate journey in a manner violative of Article I, §8, cl. 3:

> ["E]ver since Gibbons v. Ogden, 9 Wheat. (US) 1, 6 L.ed. 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority . . . "

wrote Chief Justice Stone in *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767.

In that case the Arizona Train Limit Law, which limited the size of trains to fourteen passenger or seventy freight cars was held violative of the Commerce Clause. The law required that interstate rail transport be disrupted in Arizona to adjust the length of trains to that state's demand. The "state interest [was] outweighed by the interest of the nation in an adequate economical and efficient railway transportation service, which must prevail." 325 U.S. at 783-84. Of a piece with the *Southern Pacific* decision, and more intimately related to the suit at bar, was *Morgan* v. *Virginia*, 328 U.S. 373, which held unconstitutional, under the Commerce Clause, Virginia's segregated seating statute as applied to an interstate bus passenger.

"On such interstate journeys, the enforcement of the requirements for reseating would be disturbing." 328 U.S. at 381. " . . . [S]eating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel." *Id.* at 386. And the disturbing effect of segregated seating in dining service was recognized by this Court in *Henderson* v. *United States*, 339 U.S. 816, 825, which, while dealing with the Interstate Commerce Act, condemned racial segregation in railroad dining cars as "emphasiz[ing] the artificiality of the difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility."

Only last year, the vigor of the *Morgan* and *Southern Pacific* cases was reaffirmed in *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520, which cited both with approval at pp. 526 and 528, and concluded that Illinois's mud-flap regulation was a burden on interstate commerce: "state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must . . . bow." 359 U.S. at 529.

The Richmond Trailways Terminal is, of course, itself, a stationary accommodation. But clearly it is now settled that a facility need not be in motion to come under the Commerce Clause. An interstate bus terminal restaurant, built as an integral part of the terminal structure, is as much a part of interstate commerce, as, for example, a stockyard for the care and feeding of cattle during a pause in their interstate movement. See *Stafford* v. *Wallace*, 258 U.S. 495, 519, in which Chief Justice Taft wrote that

> "this court declined to defeat the purpose [of the Commerce Clause] in respect of such a stream, and take it out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when

> considered alone and without reference to their association with the movement of which they were an essential but subordinate part."

Indeed, *Hall* v. *DeCuir*, 95 U.S. 485, struck down a statute forbidding racial distinctions on a steamboat even though the situation at bar involved an *intra*state trip. The law, it was held, interfered with interstate voyages.

Pursuant to this view the Court has held that " . . . warehouses engaged in the storage of grain for interstate or foreign commerce are in the federal domain . . . ," *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 229; and that a transaction with a redcap during a stop at a railroad station is within the same jurisdiction, *N.Y. N.H. & H. R. Co.* v. *Nothnagle*, 346 U.S. 128, 130.[7] Petitioner submits, therefore, that in determining the standards which the terminal and the restaurant, which was an integral part of it, must meet under the Commerce Clause, the same rules must apply, for purposes of this case, as would be applied to a moving bus.

It has been argued that the Commerce Clause does not reach rules of carriers which have no origin in state law. A like argument was made in *Re Debs*, 158 U.S. 564, 581. To this, the opinion of the Court replied:

> "It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision

---

7 See also *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 228. *Sprout* v. *South Bend*, 277 U.S. 163, 168. And see also *Kirschenbaum* v. *Walling*, 316 U.S. 517 (commerce power, expressed in the Fair Labor Standards Act, as interpreted in that case, reached employees of a loft building whose tenants were principally engaged in interstate commerce). All of these are cases which hold that the commerce power extends sufficiently far to uphold federal regulation of activities, which themselves, actually do not move among the States.

has been to declare that it is not within the competency of a state to legislate in such a manner as to obstruct interstate commerce. If a state with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?"

Here, however, we have, in addition, police arrest and court conviction. Concerning such circumstances, in a background of racial discrimination in interstate travel, two Courts of Appeals have held the racial restriction unconstitutional. The Fourth Circuit has written:

"Under *the company's regulations*, the three coaches first in line were designed for Negro passengers and the next two for white passengers . . . " (Emphasis supplied.)

"At Richmond, the *trainmen* segregated the passengers . . . The regulations of the company upon which the decision of the case turns were issued to the trainmen . . . " (Emphasis supplied.)

"It is true that the regulation of the carrier was not enacted by state authority, although the power of the state is customarily involved to enforce it, but we know of no principle of law which requires the courts to strike down a state statute which interferes with interstate commerce but to uphold a railroad regulation which is infected with the same vice."

Evance v. *Lambeth*, 186 F.2d 879, 880, 883 (4th Cir. 1951), ert. denied 341 U.S. 941, Parker, Soper, Dobie, *JJ.*

And, in *Whiteside* v. *Southern Bus Lines*, 177 F.2d 949, 52 (6th Cir., 1949), the Sixth Circuit held, per Hicks, imons and McAllister, *JJ.*, that

"appellant here boarded an interstate conveyance in Illinois which has neither statute, decision or custom sanctioning or requiring segregation based upon race or color. The requirement [of the carrier] that she change her seat with all her accompanying impedimenta the moment she crossed the Kentucky line, was a breach of the uniformity which under the Morgan case, is a test of the burden placed upon interstate commerce.

"It must also be observed that acts burdening interstate commerce are not, like those inhibited in the Fourteenth Amendment, limited to state action. Burdens may result from the activities of private persons as the great mass of federal criminal legislation validated under the authority of the Commerce Clause, discloses. But, if state action is a prerequisite to the invalidity of the regulation here considered as it was applied to the appellant, state action is clearly to be perceived in the ejection of the appellant by a state police officer."[8]

Here we have similar elements which compel a conclusion that halting Boynton's journey violated the Commerce Clause: A racial impediment to reasonably secur-

8 To the extent that requisite state involvement is supplied by police enforcement of an intrastate carrier segregation regulation, the Fifth Circuit, in passing on a Fourteenth Amendment contention recently has arrived at a similar result. *Boman* v. *Birmingham Transit Co.*, No. 18187, July 12, 1960, Fifth Circuit, Tuttle and Wisdom, *JJ.* (Cameron, *J.*, dissenting), held that "so long as such an ordinance [committing seating arrangements to the driver] was in force, *the acts of the Bus Company* in requiring racially segregated seating were state acts and were thus violative of the appellant's constitutional rights. . . ." (Emphasis supplied.)

"Of course, the simple company rule that Negro passengers must sit in back and white passengers must sit in front, while an unnecessary affront to a large group of its patrons would not effect a denial of [Fourteenth Amendment] constitutional rights if not enforced by force or by threat of arrest and criminal action."

ing meal service in the manner of white passengers in the course of an interstate journey, in an interstate terminal restaurant constructed and maintained for the purpose of facilitating interstate commerce; an interruption of the interstate journey, complete and decisive; and, should state involvement be required for application of the Commerce Clause, invocation of state statute to enforce the racial rule and the full intervention of Virginia police and courts to uphold it.

In *Southern Pacific* v. *Arizona*, 325 U.S. 761, 768, Chief Justice Stone, writing of the limitations which the Commerce Clause places upon activities which burden interstate commerce, stated—"[w]hether or not this long recognized distribution of powers between the national and the state governments is predicated upon the implication of the commerce clause itself [citations omitted]; or upon the presumed intention of Congress, where Congress has not spoken [citations omitted], the result is the same."

Congress certainly has not spoken explicitly on the question of whether racial segregation in an interstate bus terminal, enforced by state arrest and conviction in the courts, burdens interstate commerce. *Morgan* v. *Virginia*, *supra*, has held that Congress has not spoken on the closely related issue of racial segregation on interstate buses, 328 U.S. 373, at p. 386 (" . . . there is no federal act dealing with the separation of races in interstate transportation. . . ."). While certain provisions of the Motor Carriers Act (49 U.S.C. §316(d)) are analogous to the Interstate Commerce Act provision (49 U.S.C. §3(1)) by which this Court struck down dining car, *Henderson* v. *United States*, 339 U.S. 816 and Pullman car segregation, *Mitchell* v. *United States*, 313 U.S. 80, *Morgan* may be taken as a determination that congressional intent on the precise question of race discrimination in interstate bus travel is at least not

sufficiently express to conclude this case by itself. As in *Morgan*, this Court here, petitioner submits, should strike down the burden on commerce in the absence of contrary indications of intent from Congress.

The Court, however, by letter to counsel for Respondent has inquired concerning "the intercorporate relationship between the Trailways Bus Company and the Trailways Bus Terminal, Inc., set forth in any documents of which the Virginia courts can take judicial notice." Appendix A to Respondents' Brief in Opposition, p. 12. To Petitioner, this perhaps indicates interest by the Court in the question of congressional intention as it may have been expressed in the Motor Carriers Act. Title 49, §303(19) of that Act provides that its terms apply to services and transportation, which includes "facilities and property operated or controlled by any such carrier," and §316(d) of the Act contains an "undue preferences" and "prejudices" provision like that which this Court treated in *Henderson*, *supra*, when dealing with rail travel. These Motor Carriers Act provisions have been construed in *Keys* v. *Carolina Coach Co.*, 64 M.C.C. 769 (1955), as imposing upon bus carriers requirements concerning race like those the Interstate Commerce Act places on railroads. Under these circumstances it might be argued that the Motor Carriers Act expresses congressional intention concerning the discrimination involved in this case. That Act, so interpreted, might apply here, specifically, if the Richmond Trailways Terminal were "operated" or "controlled" by a carrier.

Petitioner submits that, if *Morgan* does not conclude the issue, whether the Trailways Bus Company and the Trailways Bus Terminal are sufficiently related to place the Terminal explicitly under the Motor Carriers Act, or not, the result is the same, for the intention of Congress, as it

treats the problem of this case, must be regarded as the same for either situation.

Should the first condition obtain (*i.e.*, the Terminal is "operated or controlled" by a carrier), obviously the expressed intention of Congress is that such racial impediment is impermissible if there is to be an unburdened flow of commerce among the states. Should the second condition obtain (*i.e.*, the terminal is not operated or controlled by a carrier), it cannot be assumed that Congress meant to remit all of the interstate terminal's multifarious acts, as regulated by the myriad provisions of the Motor Carriers Act, no matter how burdensome to interstate commerce, to the unfettered discretion of the terminal management or state law enforcing that discretion. *Bob-Lo Excursion Co.* v. *Michigan*, 333 U.S. 28, which sustained a state anti-discrimination law as applied to foreign commerce, when contrasted to *Morgan*, *supra*, demonstrates the importance attached to keeping the channels of movement among the states free from racial impediments. Therefore, validation of segregation in these channels is not merely to be assumed. Surely, if Congress intended to commit to state law the matter of racial segregation, enforced by state laws in the midst of an interstate bus journey, this intention would have been pronounced quite explicitly. But such a pronouncement would raise serious Fifth Amendment questions (see *Morgan* v. *Virginia*, 328 U.S. 373, 380—"Congress, within the limits of the Fifth Amendment has authority to burden commerce"; *Secretary of Agriculture* v. *Central Roig Refining Company*, 338 U.S. 604, 616—"not even resort to the Commerce Clause can defy the standards of due process"; and see *Bolling* v. *Sharpe*, 347 U.S. 497); however, there is no evidence of such intention and none should be imputed to Congress, especially in the light of the constitutional questions this would raise. Therefore, even in the case of an interstate terminal not "operated

or controlled" by a carrier, a racial burden like that inflicted on Boynton by the Commonwealth of Virginia, unconstitutionally burdens commerce.

In any event, the terminal in question is owned by Trailways Bus Terminal, Inc., whose officers and directors, in 1959, with one exception, were all also officers or directors of either Carolina Coach Company or Virginia Stage Lines, both interstate carriers.[9] Petitioner is depositing certified copies of the relevant corporate charters and annual reports with this Court.

While the Virginia Attorney General has concluded that the Virginia courts would not take judicial notice of these charters (Brief in Opposition, p. 4), petitioner assumes that the Attorney General would not deny the validity of these documents. In either event, the result, petitioner submits, is the same.

II.

Petitioner's criminal conviction which served only to enforce the racial regulation of the bus terminal restaurant conflicts with principles established by decisions of this Court, and thereby violates the Fourteenth Amendment.

Beyond question, petitioner was arrested by the police and convicted by the courts, pursuant to state statute, to enforce the racial segregation demanded by the Trailways Terminal restaurant. Petitioner contends that this punishment violates Fourteenth Amendment rights in that it amounts to governmental enforcement of racial segregation. See, *e.g.*, *Shelley* v. *Kraemer*, 334 U.S. 1, 18, in which the issue was whether judicial enforcement of privately

---

9 Hitchcock's Mass Transportation Directory (1959-60 ed.), 205 (Carolina Coach Co.); 242 (Virginia Stage Lines) indicates clearly the interstate character of these carriers.

arrived at racial restrictive covenants violated the Fourteenth Amendment. There the Court held that judicial enforcement of racial discrimination violates the Fourteenth Amendment:

> The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

The only contention advanced by respondents in response to this aspect of the petition for writ of certiorari seems to argue that because the discrimination originated in a "private" directive, *i.e.*, that of the restaurant management, Bruce Boynton's criminal conviction is not that sort of state action which the Fourteenth Amendment interdicts. Respondent relies on the theory expressed in *Williams* v. *Howard Johnson's Restaurant*, 268 F.2d 845 (4th Cir., 1959). Apart from the fact that that restaurant was hardly so integral a part of commerce as the one involved in this case, and that petitioner here had no reasonable alternative, but had to finish a meal quickly in the terminal and resume his bus trip, petitioner, here, seeks not relief against the restaurant, but immunity from conviction by the State and its attendant consequences, especially for one who is a law student.

Marsh v. *Alabama*, 326 U.S. 501, 505-06, stated a fundamental rule that:

> . . . the corporation's property interests do not settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.

The terminal restaurant was open to that portion of the interstate traveling public of which petitioner was a part. Indeed, it exists principally, and was built into the terminal, to serve bus riders who travel on interstate buses that make stops in Richmond. It fairly may be stated that petitioner and other travelers did not seek out the terminal; rather, they were carried into it by interstate buses for refreshment without which interstate bus travel would be impossible or highly inconvenient. Reasoning like that employed in *Marsh* has struck down trespass prosecutions for picketing in Pennsylvania Station, New York; for picketing in a Maryland shopping center, and for similar conduct in a Washington State shopping center.[10] These decisions, for similar reasons, should apply here.

Boman v. *Birmingham Transit Co.*, *supra*, p. 12, also interdicts, under the Fourteenth Amendment, state criminal prosecution in support of privately declared racial regulation on local buses, even though the statute in question it-

---

10 See n. 5, *supra*.

self made no mention of race. While some reliance there is placed on the fact that the buses were franchised, it is not so much the documents of franchise but the exclusivity which they evidenced that controls, petitioner submits. Under the circumstances of this case we have similar exclusivity.

Any weighing of reasonable alternative action that might have been taken by petitioner, cf. *Breard* v. *Alexandria*, 341 U.S. 622, 644 (magazines may sell subscriptions without door-to-door solicitation); *Republic Aviation* v. *N.L.R.B.*, 324 U.S. 793, 801, note 6 (employees denied full freedom of association in "the very time and place uniquely appropriate"), shows that his only choice was to remain hungry or submit to racial segregation, inconvenience, and humiliation.

The inquiry in a case such as this, therefore, does not begin and end with a determination of where the legal title or possessory interest lies. As in the National Labor Relations Act cases, discussed *supra*, pp. 10-11, the question is one involving other factors as well. Here, as in *United Steelworkers* v. *N.L.R.B.*, 243 F.2d 593, 598, petitioner was "lawfully within" the terminal. He behaved himself well. There was no disorder, nor was there any breach of the peace. He believed, with reason, that he had a right to the service he sought. There was no reasonable alternative action for him to take.

It cannot be argued seriously that to uphold petitioner's conviction is necessary and reasonable for the maintenance of law and order, and that, therefore, the statute in question, as applied to petitioner in these circumstances, does not violate the Constitution.[11] The common law never pro-

---

11 Compare *N.L.R.B.* v. *Fansteel Metal Corp.*, 306 U.S. at 253. ("To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.")

scribed as trespass conduct such as petitioner's—*i.e.*, conduct which did not cause breach of the peace and which was taken under a claim of right. Most other states, as footnote 3, indicates, would not have punished petitioner's conduct, either because those states have no statute covering "trespass" after refusal to depart from premises such as the terminal, or because they recognize "claim of right" as a defense, or because, in view of common law and general interpretations of this type of statute, it reasonably may be assumed that they would recognize a peacefully asserted bona fide claim of right. Neither does England or the Commonwealth countries punish conduct such as Boynton's, except, instructively, South Africa, where a statute, directed against Natives makes criminal deeds like petitioner's.

This Court, petitioner submits, should not uphold as a crime, petitioner's peacefully asserted, reasonable claim to equality in the course of a journey in interstate commerce. Virginia's action has no foundation in reason, other than to uphold race discrimination. The judgment below denies equal protection of the laws.

CONCLUSION

Wherefore, for the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

MARTIN A. MARTIN
CLARENCE W. NEWSOME
THURGOOD MARSHALL
JACK GREENBERG

Attorneys for Petitioner

LOUIS H. POLLAK
CONSTANCE BAKER MOTLEY

Of Counsel

E COPY

FILED
SEP 2 1960
JAMES R. BROWNING, Clerk

No. 7

In the Supreme Court of the United States

OCTOBER TERM, 1960

BRUCE BOYNTON, PETITIONER

v.

COMMONWEALTH OF VIRGINIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,
Solicitor General,
HAROLD R. TYLER, JR.,
Assistant Attorney General,
PHILIP ELMAN,
Assistant to the Solicitor General,
HAROLD H. GREENE,
RICHARD J. MEDALIE,
DAVID RUBIN,
GERALD P. CROPLEY,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Statement	1
Argument	4
Point I	5
Point II	9
Point III	16
Conclusion	28
Appendix	29

CITATIONS

Cases:

Air Terminal Services, Inc. v. *Rentzel*, 81 F. Supp. 611	20
American Federation of Labor v. *Swing*, 312 U.S. 321	18
Atchison, Topeka & Santa Fe Ry. Co., 135 I.C.C. 633	14
Atlantic Coast Line R. Co. v. *North Carolina Corp. Commission*, 206 U.S. 1	11
Augustus v. *City of Pensacola*, 1 R.R.L.R. 681	19
Barrows v. *Jackson*, 346 U.S. 249	17
Bob-Lo Excursion Co. v. *Michigan*, 333 U.S. 28	15
Boman v. *Birmingham Transit Co.*, decided July 12, 1960	26
Bridges v. *California*, 314 U.S. 252	18
Brown v. *Board of Education*, 347 U.S. 483	20
Cantwell v. *Connecticut*, 310 U.S. 296	18
Chance v. *Lambeth*, 186 F. 2d 879, certiorari denied, 341 U.S. 941	10, 11
City of Greensboro v. *Simkins*, 246 F. 2d 425	20

Cases—Continued

	Page
City of Petersburg v. *Alsup*, 238 F. 2d 830, certiorari denied, 353 U.S. 922	19
Civil Rights Cases, 109 U.S. 3	16, 17, 21
Coke v. *City of Atlanta*, (N.D. Ga.)	20
Dayton Union Ry. Co. Tariff for Redcap Service, 256 I.C.C. 289	12
Debs In re, 158 U.S. 564	11
Derrington v. *Plummer*, 240 F. 2d 922, certiorari denied, 353 U.S. 924	20
Draper v. *City of St. Louis*, 92 F. Supp. 546, appeal dismissed, 186 F. 2d 307	19
Fay v. *New York*, 332 U.S. 261	27
Flemming v. *South Carolina Electric & Gas Co.*, 224 F. 2d 752, appeal dismissed, 351 U.S. 901	21
Freeman v. *Retail Clerks Local 1207* (Kings County Super. Ct., Washington), decided December 9, 1959 (28 U.S.L. Week 2311)	25
Gayle v. *Browder*, 352 U.S. 903	20
Gibbons v. *Ogden*, 9 Wheat. 1	9
Hall v. *DeCuir*, 95 U.S. 485	9
Hayes v. *Crutcher*, 137 F. Supp. 853	19
Henderson v. *United States*, 339 U.S. 816	7, 10, 12, 13, 15
Henry v. *Greenville Airport Commission*, decided April 20, 1960	20
Holley v. *City of Portsmouth*, 150 F. Supp. 6	19
Holmes v. *City of Atlanta*, 350 U.S. 879, reversing 223 F. 2d 93	19
Hurd v. *Hodge*, 334 U.S. 24	27
Kansas City So. Ry. Co. v. *Kaw Valley Dist.*, 233 U.S. 75	10
Kerr v. *Enoch Pratt Free Library*, 149 F. 2d 212, certiorari denied, 326 U.S. 721	21

Cases—Continued

	Page
Keys v. *Carolina Coach Co.*, 64 M.C.C. 769	8
Korematsu v. *United States*, 323 U.S. 214	22
Kreshik v. *St. Nicholas Cathedral*, 363 U.S. 190	18
Lawrence v. *Hancock*, 76 F. Supp. 1004	19, 20
Lonesome v. *Maxwell*, 220 F. 2d 386	19
McCabe v. *Atchison .T. & S.F.R. Co.*, 235 U.S. 151	19
Marsh v. *Alabama*, 326 U.S. 501	5, 17, 24, 25, 26
Mayor and City Council of Baltimore v. *Dawson*, 350 U.S. 877, affirming 220 F. 2d 386	19
Mitchell v. *United States*, 313 U.S. 80	7, 10, 13, 15, 19, 21
Moorhead v. *City of Ft. Lauderdale*, 152 F. Supp. 131, affirmed, 248 F. 2d 544	19
Moorman v. *Morgan*, 285 S.W. 2d 146	19
Morgan v. *Virginia*, 328 U.S. 373	9, 10, 14, 15
Morris v. *Duby*, 274 U.S. 135	11
Muir v. *Louisville Park Theatrical Ass'n.*, 347 U.S. 971, reversing 202 F. 2d 275	19, 20
Munn v. *Illinois*, 94 U.S. 113	24
N.A.A.C.P. v. *Alabama*, 357 U.S. 449	18
N.A.A.C.P. v. *St. Louis-S.F. Ry. Co.*, 297 I.C.C. 335	12, 15
Nash v. *Air Terminal Services*, 85 F. Supp. 545	20
National Labor Relations Board v. *Babcock & Wilcox Co.*, 351 U.S. 105	24
New Orleans City Park Improvement Assoc. v. *Detiege*, 358 U.S. 54, affirming, 252 F. 2d 122	19
Philadelphia, B. & W.R. Co. v. *Smith*, 250 U.S. 101	11
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U.S. 793, n. 8	24

Cases—Continued Page
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 12
St. Louis-S.F. Ry. v. *Public Service Commission*, 261 U.S. 369 11
Seaboard Air Line Ry. v. *Blackwell*, 244 U.S. 310 9
Shelley v. *Kraemer*, 334 U.S. 1 5, 17, 18, 25, 27
Smith v. *Allwright*, 321 U.S. 649 26
Solomon v. *Pennsylvania R.R.*, 96 F. Supp. 709 9
South Covington Ry. v. *Covington*, 235 U.S. 537 10
Southern Pacific Co. v. *Arizona*, 325 U.S. 761 9
Tate v. *Department of Conservation*, 133 F. Supp. 53, affirmed, 231 F. 2d 615, certiorari denied, 352 U.S. 838 20
Terry v. *Adams*, 345 U.S. 461 26
Virginia v. *Rives*, 100 U.S. 313 27
Ward v. *City of Miami*, 151 F. 593, affirmed, 252 F. 2d 787 19
Whiteside v. *Southern Bus Lines*, 177 F. 2d 949 10, 11
Williams v. *Carolina Coach Co.*, 111 F. Supp. 329, affirmed, 207 F. 2d 408 8
Williams v. *Howard Johnson's Restaurant*, 268 F. 2d 845 13, 14
Williams v. *Kansas City, Mo.*, 104 F. Supp. 848, affirmed, 205 F. 2d 47, certiorari denied, 346 U.S. 826 19

Constitution and statutes:
United States Constitution:
Fourteenth Amendment 15, 16, 17, 18, 19, 20, 27
Art. I, Sec. 8, Cl. 3 9, 11
Act of September 18, 1940, 54 Stat. 899 5
Civil Rights Act of 1866, 14 Stat. 27 23
Civil Rights Act of 1875, 18 Stat. 336 23

Constitution and statutes—Continued

Interstate Commerce Act, 49 U.S.C. 1, *et seq.*:
National Transportation Policy (preceding 49 U.S.C. 1) 5–6
49 U.S.C. 3(1) 7, 12
49 U.S.C. 16(13) 8
49 U.S.C. 303(a)(19) 7, 9
49 U.S.C. 304(d) 8
49 U.S.C. 316(a) 6
49 U.S.C. 316(d) 6, 7
42 U.S.C. 1981 ..... 27, 28
42 U.S.C. 1982 ..... 27, 28
Miscellaneous:
Cong. Globe, 42d Cong., 2d Sess., pp. 381, 382–383 23
Cong. Record, 43d Cong., 1st Sess., p. 11 23
1 R.R.L.R. 681 24
N.Y. Times, April 23, 1960, p. 21, col. 1 25

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 7

BRUCE BOYNTON, PETITIONER

v.

COMMONWEALTH OF VIRGINIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

At 8:00 p.m. on December 20, 1958, petitioner, a Negro student in his third year at the Howard University School of Law in Washington, D.C., boarded a Trailways bus in Washington to travel to his home in Selma, Alabama (R. 27). He had in his possession a ticket entitling him to travel to Montgomery, Alabama, on Trailways (R. 27). The bus arrived at the Trailways Bus Terminal in Richmond, Virginia, at about 10:40 p.m. When the driver pulled the bus up to the stop at the terminal, he notified the passengers, including petitioner, that there would be a forty-minute stopover (R. 28).

Because he was hungry, petitioner alighted from the bus and entered the terminal to get something to eat (R. 28). He had never stopped in Richmond before and did not know of any other place where he could get something to eat within such a short time (R. 29). There were two restaurants in the terminal. One, which was "customarily used for colored people" (R. 22), appeared to be crowded (R. 28). Petitioner proceeded to the other restaurant, "customarily used for * * * white" people (R. 22) which was not crowded, and sat down upon one of the vacant stools at the counter (R. 28).

One of the waitresses thereupon asked him to leave and go over to the other restaurant (R. 28). He informed her that the other restaurant was somewhat crowded and that he was an interstate passenger (R. 28). She insisted that, because of specific orders which she had been given and also because of the custom there, she could not serve him (R. 28). He reminded her that he was an interstate passenger and explained that, because his bus would be leaving within a short time, he would like to get something that would not take too long to prepare (R. 28). The waitress suggested that he purchase a prepared sandwich, whereupon he ordered one of the sandwiches with a beverage (R. 29).

The waitress departed, and then returned and informed petitioner that she had orders not to serve him (R. 29). He then asked her to find someone who could serve him (R. 29). She departed again and returned with the Assistant Manager of the restaurant (R. 20, 29). The Assistant Manager told petitioner

that he could not be served (R. 29), explained that there was a restaurant "on the other side for the colored" (R. 21), and suggested that he go to that restaurant (R. 21). Petitioner refused and continued to insist that his status as an interstate passenger entitled him to be served (R. 29). The Assistant Manager then called a police officer to enlist his aid in getting petitioner to leave (R. 21). The officer took petitioner outside and "tried to explain to him the situation" (R. 21), and then returned and asked the Assistant Manager if he wanted a warrant for petitioner's arrest (R. 21). After first replying in the negative (R. 21), the Assistant Manager, upon noticing that petitioner had returned, reconsidered and caused petitioner to be arrested for trespassing (R. 21, 29).

The bus terminal was owned and operated by Trailways Bus Terminal, Inc. (R. 9). The restaurants were built into the terminal upon its construction and leased by Trailways to Bus Terminal Restaurant of Richmond, Inc. (R. 9–17). The lease grants exclusive authority to the latter to operate restaurants in the terminal (R. 10) and requires that the restaurants be operated in keeping with the character of service maintained in an up-to-date, modern bus terminal (R. 14), that the lessee obtain the lessor's permission before selling any commodity not usually sold or installed in a "bus terminal concession" (R. 11), that the lessee refrain from selling on buses operating in or out of the terminal, and that, upon notice from the lessor, the lessee refrain

from making sales through the windows of the buses (R. 16). At no facility in the terminal, with the exception of these restaurants, is racial segregation required or practiced (R. 8).

Trial on the trespassing charge was held on January 6, 1959, in the Police Court of the City of Richmond (R. 19). At the conclusion of the proceedings, petitioner was found guilty and fined $10 (R. 30). On February 20, 1959, the judgment was approved by the Hustings Court of the City of Richmond (R. 30–31). On June 19, 1959, the Supreme Court of Appeals of Virginia affirmed the judgment of the Hustings Court (R. 32).

ARGUMENT

During the course of his journey, petitioner, an American citizen traveling from one state to another on a federally-regulated carrier, was denied, solely because of his race or color, the right to equal treatment in the use of an essential transportation facility—in this instance, a restaurant in a bus terminal serving interstate passengers. This denial was compounded by the action of a state in prosecuting and punishing him as a criminal trespasser. The invocation of the state's trespass law against petitioner for acts constituting a peaceable and orderly attempt to exercise his federal rights to equal treatment in the use of transportation facilities while traveling on interstate carriers subject to federal regulation had the necessary and inevitable effect of thwarting and defeating these rights.

This case does not involve purely private or individual action which is in no respect enforced, implemented,

or supported by governmental authority. It does not present any question as to "the right of a homeowner" to choose or "to regulate the conduct of his guests" (*Marsh* v. *Alabama*, 326 U.S. 501, 506), for the facilities with which we are concerned here were "built and operated primarily to benefit the public" (*ibid.*). Nor is this a case in which the state "has merely abstained from action, leaving private individuals free to impose such discriminations as they see fit." *Shelley* v. *Kraemer*, 334 U.S. 1, 19. On the contrary, the judgment here under review represents an affirmative exertion of governmental authority to sanction and consummate racial discrimination, thereby making the state itself a party to the discrimination. In short, the significant aspects of this case are its *public, interstate,* and *governmental action* aspects.

I

The discrimination here against petitioner conflicts both with the general purposes and objects of the Interstate Commerce Act, 49 U.S.C. 1, *et seq.*, as embodied in the "National Transportation Policy,"[1]

[1] 49 U.S.C. preceding Section 1, added to the Interstate Commerce Act by the Act of September 18, 1940, 54 Stat. 899. Segregation of interstate bus passengers by race in a bus terminal restaurant is contrary to the "National Transportation Policy" in almost every one of its particulars. That policy is as follows: "It is hereby declared to be the national transportation policy of the Congress to provide for *fair and impartial regulation of all modes of transportation* subject to the provisions of this Act, * * * so administered as *to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation* and among the several carriers; *to encourage the establishment and maintenance of reasonable*

and with several of the specific provisions of the Act,[1] especially 49 U.S.C. 316(d).[2] That subsection states clearly that it "shall be unlawful * * * to subject any

---

charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of *developing, coordinating and preserving a national transportation system* by water, highway, and rail, as well as other means, *adequate to meet the needs of the commerce of the United States*, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy" (emphasis added).

[1] For example, 49 U.S.C. 316(a) provides in pertinent part that "[i]t shall be the duty of every common carrier of passengers by motor vehicle * * * to provide * * * adequate service * * * and facilities for the transportation of passengers in interstate or foreign commerce; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable regulations and practices relating thereto, and to * * * the facilities for transportation, and all other matters relating to or connected with the transportation of passengers in interstate or foreign commerce * * *." It seems clear that a segregated dining facility is foreign to the mandate, embodied in Section 316(a), that "adequate service and facilities" be maintained for all, including Negro passengers. Similarly, the duty of enforcing "just and reasonable regulations and practices" relating to transportation facilities "and all other matters relating to or connected with the transportation of passengers" clearly seems to be violated by the practice of racial discrimination in the terminal facilities which the passengers must use.

[2] 49 U.S.C. 316(d) provides in pertinent part that "[a]ll charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be

particular person * * * to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *." This provision in Section 316(d), embodied in Part II of the Act dealing with "Motor Carriers," is identical to the provision in 49 U.S.C. 3(1), embodied in Part I of the Act dealing with "General Provisions and Railroad and Pipe Line Carriers," which was held in *Mitchell* v. *United States*, 313 U.S. 80, and *Henderson* v. *United States*, 339 U.S. 816, to proscribe racial discrimination in interstate railroad pullman and dining cars. Under the Act, "racial classification of passengers holding identical tickets" (*id.* at 825) is barred in relation to interstate transportation services of every kind.

To be sure, Section 316(d) speaks only of "any common carrier by motor vehicle," and not of terminals or terminal restaurant facilities as such. But 49 U.S.C. 303(a)(19) defines the "services" and "transportation" to which Part II of the Act applies as including "all facilities and property *operated or controlled by any* * * * *carrier* * * * used in the transportation of passengers or property in interstate or foreign commerce or *in the performance of any service in connection therewith*" (emphasis added).

---

unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give or cause any undue or unreasonable preference or advantage to any particular person * * * in any respect whatsoever; or to subject any particular person * * * to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *."

The facilities involved in the present case are so controlled. The Trailways Bus Terminal in Richmond, Virginia, is owned by Trailways Bus Terminal, Inc. (R. 18). According to an authenticated copy of the records of the Interstate Commerce Commission, reprinted in the Appendix, pp. 29–31, infra,[4] Virginia Stage Lines, Inc., a "common carrier by motor vehicle," owns fifty percent of the stock in Trailways Bus Terminal, Inc., and operates the terminal as a joint facility with the Carolina Coach Company, also a "common carrier by motor vehicle" (see *Williams* v. *Carolina Coach Co.*, 111 F. Supp. 329 (E.D. Va.), affirmed, 207 F. 2d 408 (C.A. 4); *Keys* v. *Carolina Coach Co.*, 64 M.C.C. 769).

The fact that the restaurant in the terminal is leased by Trailways Bus Terminal, Inc., to Bus Terminal Restaurant of Richmond, Inc., is thus immaterial here. Since a carrier is prohibited from enforcing racial segregation in facilities which it operates or controls, it may not evade its statutory responsibilities in this respect by leasing such facilities to another. The paramount federal duty of nondiscrimination is not delegable and cannot be discharged

---

[4] "[A]nnual or other reports of carriers made to the Commission * * * shall be preserved as public records * * *." 49 U.S.C. 16(13). These public records, including "copies of and extracts from" them, properly certified and sealed, "shall be received as prima facie evidence of what they purport to be * * * in all judicial proceedings * * *." *Ibid.*; see 49 U.S.C. 304(d). The extracts from the annual reports of the carrier which appear in the Appendix, pp. 29–32, *infra*, have been certified by the Secretary under the Commission's seal as required.

through lease of facilities.[5] It follows that maintenance of segregation in the Richmond terminal restaurant, and its enforcement by the state, violate the Interstate Commerce Act which thus provides a full defense against the trespass charge on which the judgment below was based. Cf. *Solomon* v. *Pennsylvania R.R.*, 96 F. Supp. 709, 712 (S.D.N.Y.).

II

Ever since *Gibbons* v. *Ogden*, 9 Wheat. 1, "the states have not been deemed to have the authority to impede substantially the free flow of commerce from state to state * * *." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767. This "long-recognized distribution of power between national and state governments" has been predicated in some cases upon the expressed or the presumed intention of Congress (*id.* at 768), and in others "upon the implications of the commerce clause itself" (*ibid.*). Thus, even in the absence of congressional action, the Commerce Clause, of its own force, requires invalidation of unreasonable state-imposed burdens on interstate commerce. See *Morgan* v. *Virginia*, 328 U.S. 373; *Hall* v. *DeCuir*, 95 U.S. 485. See also *Seaboard Air Line Ry.* v. *Blackwell*, 244 U.S.

[5] Moreover, the terms of the lease itself evidence sufficient control by the carrier for purposes of Section 303(a)(19): the terminal restaurants are required to be operated in keeping with the character of service maintained in an up-to-date, modern bus terminal (R. 14); the lessee must obtain the lessor's permission before selling any commodity not usually sold or installed in a "bus terminal concession" (R. 11); the lessee must refrain from selling on buses operating in or out of the terminal (R. 16); and, upon notice from the lessor, the lessee must also refrain from making sales through the windows of the buses (R. 16).

310; *South Covington Ry.* v. *Covington,* 235 U.S. 537.

Whether any particular state legislation is invalid depends upon whether "it unduly burdens * * * commerce in matters where uniformity is necessary * * *." *Morgan* v. *Virginia, supra,* at 377. And whether "the statute in question is a burden on commerce" depends upon the "situation created by the attempted enforcement of * * * [the] statute * * *." *Id.* at 377–378. Thus, in *Morgan* v. *Virginia, supra,* a Virginia statute required racial segregation in interstate buses. Stating that the issue of the statute's validity must be decided "as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel," the Court concluded "* * * that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel." 328 U.S. at 386. See also *Henderson* v. *United States,* 339 U.S. 816; *Mitchell* v. *United States,* 313 U.S. 80; *Chance* v. *Lambeth,* 186 F. 2d 879 (C.A. 4), certiorari denied, 341 U.S. 941; *Whiteside* v. *Southern Bus Lines, Inc.,* 177 F. 2d 949 (C.A. 6).

The application of a state statute is not the only official act of a state which has been found by the Court to be invalid as a burden on interstate commerce. In *Morgan* v. *Virginia, supra,* at 379, the Court also observed that "* * * a final court order is invalid which materially affects interstate commerce." Accord, *Kansas City So. Ry. Co.* v. *Kaw Valley Dist.,* 233 U.S. 75. An order of an administrative commission may also constitute a burden on interstate com-

merce. *Morris* v. *Duby*, 274 U.S. 135; *St. Louis-S.F. Ry.* v. *Public Service Commission*, 261 U.S. 369; *Atlantic Coast Line R. Co.* v. *North Carolina Corp. Commission*, 206 U.S. 1. Similarly, the federal courts have ruled that a burden may be created by the state enforcement of a private regulation. *Chance* v. *Lambeth, supra; Whiteside* v. *Southern Bus Lines, Inc., supra.*

In the present case, petitioner was ejected from the restaurant and arrested by a state police officer, prosecuted by the state for violation of a law enacted by the state legislature, and convicted by a state judge in a state court. Thus, whether the trespass conviction be isolated as an unconstitutional application of the state trespass law or whether it be regarded as a combination of state legislative, executive, and judicial action, it nevertheless is clearly the type of activity which is embraced within the scope of the Commerce Clause.[6]

It is not material that the present case involves racial segregation in dining facilities at bus terminals rather than on the bus itself. The furnishing of food to interstate passengers is as much a part of interstate commerce in the one place as the other. See *Philadelphia, B. & W. R. Co.* v. *Smith*, 250 U.S. 101; *Henderson* v. *United States*, 339 U.S. 816. Facilities are, of course, not removed from inter-

[6] Some courts have indicated—correctly, we believe—that racial segregation imposed by a private carrier alone, unsupported by state authority, would also constitute an unlawful burden on interstate commerce. *Chance* v. *Lambeth*, *supra*, at 882–883; *Whiteside* v. *Southern Bus Lines, Inc.*, *supra*, at 953; cf. *In re Debs*, 158 U.S. 564, 581, 582.

state commerce simply because they are stationary. See, *e.g.*, *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 229. The Interstate Commerce Commission, by asserting jurisdiction over terminal facilities such as red-cap service, *Dayton Union Ry. Co. Tariff for Redcap Service*, 256 I.C.C. 289, 299, and station waiting rooms and rest rooms, *N.A.A.C.P.* v. *St. Louis-S.F. Ry. Co.*, 297 I.C.C. 335, has demonstrated its recognition that a facility may be in interstate commerce although it is located in a terminal rather than on a moving carrier.[7] This Court, in *Henderson* v. *United States*, 339 U.S. 816, 824, characterized regulations of a railroad carrier which required segregation of the races in dining cars as "unreasonable discriminations" in violation of Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1).[8] Segregation in terminal dining

---

[7] By striking down racial segregation in station waiting rooms and rest rooms as violative of the Interstate Commerce Act, the Commission has recognized that segregation within the confines of a terminal prejudices and disadvantages a Negro traveler as unreasonably as segregation on the carrier itself. *N.A.A.C.P.* v. *St. Louis-S.F. Ry. Co.*, *supra*.

[8] In *N.A.A.C.P.* v. *St. Louis-S.F. Ry. Co.*, *supra*, the Interstate Commerce Commerce Commission refused to assert jurisdiction, under Section 3(1), over lunchrooms in the Richmond railway terminal. However, the Commission's sole basis for declining to assert jurisdiction over the lunchroom was that there had been a nineteen-year lapse in its operation, which, according to the Commission, indicated that this lunchroom had not constituted an integral part of the terminal's common-carrier functions and therefore was not within its jurisdiction. But, as the record shows in the present case, the restaurants were built as an integral part of the interstate terminal facility (R. 9), and there is no indication that they have not been in continuous operation since then. Access to the restaurant was intended to, and did, facilitate interstate travel.

facilities, no less than segregation on a moving diner, constitutes, in the words of *Henderson,* "unreasonable discrimination," "unreasonable prejudice," and "unreasonable disadvantage" to the passenger denied equality of treatment.[9]

Bus passengers are far more dependent upon terminal dining facilities than are railroad passengers. Unlike bus companies, railroads do not schedule regular stops which are long enough to permit their passengers to eat in terminals. Once a journey by rail has commenced, railroad passengers normally satisfy their food requirements during the course of the trip either by buying sandwiches and eating them while occupying seats in coaches, or by eating regular meals in the dining car of the train itself. As a practical matter, interstate bus passengers ordinarily must obtain their meals from the facilities offered at the bus terminal or go hungry. Thus, bus terminal restaurant facilities are a precise equivalent of dining cars on railroad trains.

The decision of the court of appeals in *Williams* v. *Howard Johnson's Restaurant,* 268 F. 2d 845, 848 (C.A. 4), assuming that it was correctly decided, does not compel an opposite conclusion. In that case the court decided that a restaurant located on an interstate highway in the city of Alexandria is not engaged in interstate commerce "merely because in the course of its business of furnishing accommodations to the

[9] This Court has similarly characterized, and has held repugnant to the Interstate Commerce Act regulations segregating Negroes from whites in Pullman cars. *Mitchell* v. *United States, supra.*

general public it serves persons who are traveling from state to state," and it concluded that the restaurant was "an instrument of local commerce."[10] The Trailways bus restaurant in Richmond, on the other hand, is located in an interstate bus terminal, was constructed at the same time that the terminal was constructed (R. 9), and was leased upon conditions requiring that the lessee obtain the lessor's permission before selling any commodity not usually sold or installed in a "bus terminal concession" (R. 11), and that the restaurant be operated "in keeping with the character of service maintained in an up-to-date, modern bus terminal" (R. 14). There is therefore no warrant for designating the restaurant in this case as "an instrument of local commerce." Even though it may incidentally serve local traffic (R. 23), it clearly is primarily an instrument of interstate travel, and in this case it was in fact sought to be used by petitioner in connection with his interstate journey. Cf. *Atchison, Topeka & Santa Fe Ry. Co.*, 135 I.C.C. 633, 634–635.

Racial discrimination or segregation interferes with a "single, uniform rule to promote and protect national travel" (*Morgan* v. *Virginia, supra,* at 386), and thereby imposes a burden on interstate commerce. In instances in which rules have varied from state to state with respect to racial discrimination or nondiscrimination in interstate transportation facilities, the Court has held invalid statutes requiring racial

[10] The plaintiff in the *Williams* case contended that the private segregation itself constituted a burden on interstate commerce. Cf. footnote 6, *supra*.

discrimination (see, *e.g.*, *Morgan* v. *Virginia, supra*) because of their tendency to undermine any "single, uniform rule to promote and protect national travel." See *Bob-Lo Excursion Co.* v. *Michigan,* 333 U.S. 28, 40. If diversity of racial rules from state to state is to be avoided, and uniformity with respect to interstate travel achieved, racial discrimination and segregation, be it by state statute no matter how enforced, must be deemed invalid. Interstate commerce would flow more smoothly if states did not use their criminal process to support racially discriminatory policies of the proprietors of such restaurants, and if the latter were thereby encouraged to serve all interstate passengers indiscriminately instead of refusing to serve some of them on grounds irrelevant to the interstate travel.

Moreover, enforcement of racial discrimination, such as that involved in the present case, supports and accentuates an unreasonable disadvantage and prejudice to a class of interstate travelers. Cf. *Henderson* v. *United States,* 339 U.S. 816, 824; *Mitchell* v. *United States,* 313 U.S. 80. Since interstate bus travel cannot be conducted without regularly scheduled bus stops, and since dining facilities at such stops are an integral and essential part of interstate bus service, the disadvantage and prejudice cannot be avoided by the interstate Negro bus traveler. In *N.A.A.C.P.* v. *St. Louis-S.F. Ry. Co.,* 297 I.C.C. 335, 347, the Interstate Commerce Commission, in ordering the end of segregation in interstate rail travel, declared:

> * * * The disadvantage to a traveler who is assigned accommodations or facilities so desig-

nated as to imply his inherent inferiority solely because of his race must be regarded under present conditions as unreasonable. Also, he is entitled to be free of annoyances, some petty and some substantial, which almost inevitably accompany segregation even though the rail carriers, as most of the defendants have done here, sincerely try to provide both races with equally convenient and comfortable cars and waiting rooms.

Racial segregation works a serious and unwarranted burden and hardship upon those against whom it operates, and the prospect of encountering it in bus terminals surely operates as a deterrent to a Negro contemplating an interstate bus journey. National travel is hindered by the enforcement of such arbitrary discriminations in service. Persons holding the same tickets, whatever their race, color, religion or other irrelevant personal characteristic, are entitled to the same service and treatment when they travel in interstate commerce. Under the controlling provisions of federal law, a Negro passenger is free to travel the length and breadth of this country without hindrance or humiliation, and to receive precisely the same service, no more and no less, as any other passenger.

III

In the *Civil Rights Cases,* 109 U.S. 3, 11, this Court declared that "positive rights and privileges are undoubtedly secured by the Fourteenth Amendment," which "nullifies and makes void all State legislation, and *State action of every kind,* which impairs the

privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws." *Ibid.* (emphasis added). Racially discriminatory acts of individuals, moreover, are insulated from the proscription of the Fourteenth Amendment only insofar as they are "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings," or are "not sanctioned in some way by the State." *Id.* at 17.

That the discrimination in the present case was of private origin is irrelevant. The application of a general, nondiscriminatory, and otherwise valid law to effectuate a racially discriminatory policy of a private agency, and the enforcement of such a discriminatory policy by state governmental organs, has been held repeatedly to be a denial by state action of rights secured by the Fourteenth Amendment. Thus, in *Shelley* v. *Kraemer,* 334 U.S. 1, the judicial enforcement of private racially restrictive covenants by injunction was held violative of the Fourteenth Amendment; similarly, in *Barrows* v. *Jackson,* 346 U.S. 249, this Court decided that such covenants could not be enforced, consistently with the Fourteenth Amendment, by the assessment of damages for their breach; and in *Marsh* v. *Alabama,* 326 U.S. 501, this Court ruled that the criminal courts could not be used to convict of trespass persons exercising their rights of free speech in a privately-owned company

town.[11] See also *Kreshik* v. *St. Nicholas Cathedral*, 363 U.S. 190, 191; *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 463.

If, in *Shelley*, the action of a state judiciary alone was in question, in the present case each branch of state government contributed directly and substantially to the support and enforcement of the terminal restaurant's discriminatory policy. By the active intervention of the executive and judicial branches of that government, applying a law passed by its legislature, "the full panoply of state power" (*Shelley* v. *Kraemer, supra*, at 19) was exerted to deny to petitioner, on the ground of race or color, the enjoyment of the right to equal treatment in the use of accommodations open to the public generally—here interstate travel facilities—a right clearly secured by

[11] It is immaterial that the state judicial action which enforces the denial of rights guaranteed by the Fourteenth Amendment may be procedurally fair. Such action is constitutionally proscribed "even though the judicial proceedings * * * may have been in complete accord with the most rigorous conceptions of procedural due process." *Shelley* v. *Kraemer*, *supra* at 17. See also *Bridges* v. *California*, 314 U.S. 252; *American Federation of Labor* v. *Swing*, 312 U.S. 321; *Cantwell* v. *Connecticut*, 310 U.S. 296. Similarly, it is no answer to say that the state courts stand ready to convict white persons of trespass should they refuse to leave bus terminal restaurants from which they have been excluded because of race or color. "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. * * * Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, *supra* at 22.

the Fourteenth Amendment. See *Mitchell* v. *United States*, 313 U.S. 80, 94.[12]

The right not to be excluded solely on account of race from facilities open to the public has been held to extend to such accommodations as public beaches and bathhouses (*Mayor and City Council of Baltimore* v. *Dawson*, 350 U.S. 877, affirming 220 F. 2d 386 (C.A. 4)),[13] golf courses (*Holmes* v. *City of Atlanta*, 350 U.S. 879, reversing 223 F. 2d 93 (C.A. 5)),[14] park and recreational facilities (*New Orleans City Park Improvement Assoc.* v. *Detiege*, 358 U.S. 54, affirming, 252 F. 2d 122 (C.A. 5)),[15] and theatres (*Muir* v. *Louisville Park Theatrical Ass'n.*, 347 U.S. 971, reversing 202 F. 2d 275 (C.A. 6), and remanding for consideration in

---

[12] There, the Court stated that "[t]he denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment." See also *McCabe* v. *Atchison, T. & S.F. Ry.*, 235 U.S. 151, 160–162.

[13] See also *City of Petersburg* v. *Alsup*, 238 F. 2d 830 (C.A. 5), certiorari denied, 353 U.S. 922; *Williams* v. *Kansas City, Mo.*, 104 F. Supp. 848 (W.D. Mo.), affirmed, 205 F. 2d 47 (C.A. 8), certiorari denied, 346 U.S. 826; *Draper* v. *City of St. Louis*, 92 F. Supp. 546 (E.D. Mo.), appeal dismissed, 186 F. 2d 307 (C.A. 8); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S.D. W. Va.).

[14] See also *Moorhead* v. *City of Ft. Lauderdale*, 152 F. Supp. 131 (S.D. Fla.), affirmed, 248 F. 2d 544 (C.A. 5); *Holley* v. *City of Portsmouth*, 150 F. Supp. 6 (E.D. Va.); *Ward* v. *City of Miami*, 151 F. Supp. 593 (S.D. Fla.), affirmed, 252 F. 2d 787 (C.A. 5); *Hayes* v. *Crutcher*, 137 F. Supp. 853 (M.D. Tenn.); *Augustus* v. *City of Pensacola*, 1 R.R.L.R. 681.

[15] See also *Lonesome* v. *Maxwell*, 220 F. 2d 386 (C.A. 4); *Augustus* v. *City of Pensacola*, *supra*; *Moorman* v. *Morgan*, 285 S.W. 2d 146 (Ky.).

light of *Brown* v. *Board of Education*, 347 U.S. 483, and "conditions that now prevail").[16]

A restaurant, like a theatre, a common carrier, a school, a beach, a pool, a park, or a golf course, is a place of public accommodation. The federal courts have held, therefore, that rights guaranteed by the equal protection clause are contravened when a private lessee of a state-owned restaurant engages in racially discriminatory practices. *Derrington* v. *Plummer*, 240 F. 2d 922 (C.A. 5), certiorari denied, 353 U.S. 924; *Coke* v. *City of Atlanta* (N.D. Ga.).[17] These holdings illustrate, moreover, that where the state enforces or supports racial discrimination in a place open for the use of the general public—as, in this case, interstate transportation facilities—it infringes Fourteenth Amendment rights notwithstanding the private origin of the discriminatory conduct.[18]

Nor is it relevant that the property upon which the discrimination occurs is privately owned. State laws which require or permit segregation of the races on privately owned interstate motor buses are invalid under the Fourteenth Amendment. *Gayle* v. *Brow-*

---

[16] See also *Henry* v. *Greenville Airport Commission* (C.A. 4), decided April 20, 1960 (waiting room in a municipal airport).

[17] Cf. *Nash* v. *Air Terminal Services*, 85 F. Supp. 545 (E.D. Va.); *Air Terminal Services, Inc.* v. *Rentzel*, 81 F. Supp. 611 (E.D. Va.).

[18] Accord, *Muir* v. *Louisville Park Theatrical Ass'n.*, *supra*; *City of Greensboro* v. *Simkins*, 246 F. 2d 425 (C.A. 4); *Derrington* v. *Plummer*, *supra*; *Tate* v. *Department of Conservation*, 133 F. Supp. 53 (E.D. Va.), affirmed, 231 F. 2d 615 (C.A. 4), certiorari denied, 352 U.S. 838; *Nash* v. *Air Terminal Services*, *supra*; *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S.D. W. Va.).

der, 352 U.S. 903; *Flemming* v. *South Carolina Electric & Gas Co.,* 224 F. 2d 752, appeal dismissed, 351 U.S. 901; see *Mitchell* v. *United States,* 313 U.S. 80, 94. Racial discrimination by a privately-owned place of public accommodation may also violate Fourteenth Amendment rights if such place is financially supported or regulated by the state. *Kerr* v. *Enoch Pratt Free Library,* 149 F. 2d 212 (C.A. 4), certiorari denied, 326 U.S. 721. That the right to equal treatment in places of public accommodation is protected by the Fourteenth Amendment against deprivation by state action is not impaired by the decision in the *Civil Rights Cases,* 109 U.S. 3, for there the Court carefully reserved the question whether the Amendment secured the right to be free from *state*-sanctioned discrimination in places of public accommodations.[19]

---

[19] The Court emphasized that it was reserving this question (109 U.S. at 19, 21, 24):

> We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right, or not, is a different question which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.
>
> * * * * *
>
> But is there any similarity between such servitudes [the burdens and disabilities incident to feudal vassalage] and a denial by the owner of an inn, a public conveyance, or a theatre, of its accommodations and privileges to an in-

Because an asserted justification for invasion of the right to be free from state enforcement of racially discriminatory practices warrants the most searching judicial scrutiny, such enforcement can withstand attack, if at all, only where the constitutional right is subordinated to a countervailing right or interest so weighty as to occupy a preferred constitutional status. *Cf. Korematsu* v. *United States*, 323 U.S. 214, 216. The narrow issue in the present case is not whether the right, for example, of a homeowner to choose his guests should prevail over petitioner's constitutional right to be free from the state enforcement of a policy of racial discrimination, but rather whether the interest of a proprietor who has opened up his business property for use by the general public—in particular, by passengers travelling in interstate com-

---

dividual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? *Whether it might not be a denial of a right which, if sanctioned by state law, would be obnoxious to the prohibitions of the Fourteenth Amendment, is another question.*

* * * * *

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the states by the Fourteenth Amendment are forbidden to deny to any person? And is the Constitution violated until the denial of the right has some State sanction or authority? [Emphasis added.]

merce on a federally-regulated carrier—should so prevail.[20]

---

[20] During debate on the bill introduced in the Senate by Charles Sumner of Massachusetts on December 20, 1871, to amend the Civil Rights Act of 1866, 14 Stat. 27, which served as the precursor to the Civil Rights Act of 1875, 18 Stat. 336, Senator Sumner distinguished between a man's home and places and facilities of public accommodation licensed by law: "Each person, whether Senator or citizen, is always free to choose who shall be his friend, his associate, his guest. And does not the ancient proverb declare that a man is known by the company he keeps? But this assumes that he may choose for himself. His house is his 'castle'; and this very designation, borrowed from the common law, shows his absolute independence within its walls; * * * but when he leaves his 'castle' and goes abroad, this independence is at an end. He walks the streets; but he is subject to the prevailing law of Equality; nor can he appropriate the sidewalk to his own exclusive use, driving into the gutter all whose skin is less white than his own. But nobody pretends that Equality on the highway, whether on pavement or sidewalk, is a question of society. And, permit me to say, that *Equality in all institutions created or regulated by law* is as little a question of society" (emphasis added). After quoting Holingshead, Story, Kent and Parsons on the common law duties of innkeepers and common carriers to treat all alike, Sumner then said: "As the inn cannot close its doors, or the public conveyance refuse a seat to any paying traveler, decent in condition, so it must be with the theater and other places of public amusement. Here are institutions whose peculiar object is the 'pursuit of happiness,' which has been placed among the equal rights of all." Cong. Globe, 42d Cong., 2d Sess., 382-383. See also Cong. Rec., 43d Cong., 1st Sess., 11: "Our colored fellow-citizens must be admitted to complete equality before the law. In other words, everywhere *in everything regulated by law*, they must be equal with all their fellow citizens. There is the simple principle on which this bill stands" (emphasis added); Cong. Globe, 42d Cong., 2d Sess., 381: "The precise rule is Equality before the Law; * * * that is, that condition before the Law in which all are alike—being entitled, *without any discrimination to the equal enjoyment of all institutions, privileges, advantages and conveniences created or regulated by law* * * *" (emphasis added).

Courts have long placed restrictions upon proprietors whose operations are of a public nature, affecting the community at large. As early as *Munn* v. *Illinois*, 94 U.S. 113, 126, this Court said:

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. * * *

This Court in *Marsh* v. *Alabama*, 326 U.S. 501, 506, similarly rejected the contention that the rights of a proprietor of property open to the public were coextensive with those of a homeowner:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it * * *[21]

---

[21] *Cf. Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 798, 802, n. 8; *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112. Although *Marsh* v. *Alabama* involved the rights of free speech and religion, its principle is equally applicable to other Fourteenth Amendment rights, and this Court, in *Shelley* v. *Kraemer*, *supra*, at 22, has specifically applied it to the right to equal protection of the laws, stating that "the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. *Cf. Marsh* v. *Alabama*, 326 U.S. 501 (1946)."

Only recently, a Washington court applied the *Marsh* principle in rejecting the right of an owner of a shopping center to obtain an injunction from a state court restraining peaceful picketing on the privately-owned sidewalks of the shopping center. *Freeman* v. *Retail Clerks Local 1207* (Kings County Super. Ct., Washington), decided December 9, 1959 (28 U.S. Law Week 2311). The court noted that the owner had contracted away his right to private and personal use and occupancy, and emphasized that interference with the owner's fundamental right of privacy was not involved because he had devoted his property for use by the general public. In April of this year, the Superior Court of Raleigh, North Carolina, relying on the *Marsh* decision, dismissed trespass charges against forty-three Negroes who had been arrested for demonstrating on the privately-owned sidewalks of a shopping center against segregated lunch counters in the stores of the shopping center. See New York Times, April 23, 1960, p. 21, col. 1.

The concepts of "private property" and "state action," as *Marsh* illustrates, do not fall into neat, precise categories. In the last analysis, the determination whether private conduct has been so "panoplied" by governmental action, power, or support that it may fairly be judged by the standards of the Fourteenth Amendment is, like so many questions of constitutional law, one of proximity and degree. As already noted, this case concerns, not an individual home owner, but an essential public transportation facility in the direct stream of interstate commerce

and subject to effective federal regulation under the Interstate Commerce Act. While the facility here may be distinguished from a company town, such as was involved in *Marsh* v. *Alabama,* or from the primary voting machinery involved in *Terry* v. *Adams,* 345 U.S. 461, 473, and *Smith* v. *Allwright,* 321 U.S. 649, we think the underlying rationale of those cases is equally applicable here. The Trailways Bus Terminal in Richmond, Virginia, is not comparable to a home or even to a corner grocery store. Though privately owned, it is an interstate facility operated for the benefit of the general public, in relation to which the broad constitutional principle of *Marsh* v. *Alabama* may properly be applied. Cf. *Boman* v. *Birmingham Transit Co.,* decided July 12, 1960, in which the Fifth Circuit held that because of "the peculiar function" performed by a bus transit company as a public utility "and its relation to the City and State of Alabama through its holding of a special franchise to operate on the public streets of Birmingham," the acts of the bus company in requiring racially segregated seating were "state acts," and thus violated the constitutional rights of Negro passengers.

To be sure, local trespass laws are directed towards the avoidance of breaches of the peace. But petitioner's conduct was peaceable and orderly; if any threat to the peace was involved, it arose solely from the racial discrimination against him. Accordingly, if the state's legitimate interest in preventing breaches of the peace is made the basis of governmental intervention in such a situation, its intervention could be constitutionally

justified only if directed at the source of the threat to the peace, rather than at the person who is being discriminated against.

The federal statutory and constitutional rights here invoked are derived from not only the Interstate Commerce Act and the Fourteenth Amendment, but the Civil Rights Acts as well. 42 U.S.C. 1981 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, * * * and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens * * *." 42 U.S.C. 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to * * * purchase * * * real and personal property." Referring to similar statutory provisions involving jury service, this Court has declared: "For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination." *Fay* v. *New York*, 332 U.S. 261, 282–283. See also *Shelley* v. *Kraemer*, 334 U.S. 1, 10–12; *Hurd* v. *Hodge*, 334 U.S. 24, 30–34. In *Virginia* v. *Rives*, 100 U.S. 313, 318, the Court, speaking of these statutes, said:

> The plain object of these statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same.

When a state abets or sanctions discrimination against a colored citizen who seeks to patronize a business establishment open to the general public, the colored citizen is thereby denied the right "to make and enforce contracts" and "to purchase personal property" guaranteed by 42 U.S.C. 1981 and 1982 against deprivation on racial grounds.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed with directions to vacate the conviction and dismiss the criminal proceedings brought against petitioner.

J. LEE RANKIN,
Solicitor General.
HAROLD R. TYLER, JR.,
Assistant Attorney General.
PHILIP ELMAN,
Assistant to the Solicitor General.
HAROLD H. GREENE,
RICHARD J. MEDALIE,
DAVID RUBIN,
GERALD P. CHOPPIN,
Attorneys.

SEPTEMBER 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960

APPENDIX

I. C. C. Docket No. MC 59239

ANNUAL REPORT

ORGANIZATION AND CONTROL

1. State full and exact name of respondent making this report:
Virginia Stage Lines, Inc.

doing business as Virginia Trailways

2. Name, title, and address of officer, owner or partner to whom correspondence concerning this report should be addressed.

(Name)	(Title)	
D. S. Marshall	Office Manager	
114-4th St., S. E. (Number) (Street)	Charlottesville (City)	Virginia (State)

3. Address of office where accounting records are maintained

114-4th St., S. E. (Number) (Street)	Charlottesville (City)	Virginia (State)

4. Carrier is Corporation
(Individual, partnership, corporation, association, etc.)

5. If a partnership, state the names and addresses of each partner, including silent or limited, and their interests:

Name	Address	Proportion of interest

6. If a corporation, association, or other similar form of enterprise:

A. Incorporation or organization was—
In the State of Virginia on March 20, 1925

B. The directors' names, addresses, and terms of office are:

Name	Address	Term expires
S. A. Jessup	Charlottesville, Va.	One year or until
P. S. Jessup	Washington, D. C.	successors are
C. A. Jessup	Charlottesville, Va.	duly elected.
J. L. Jessup	Charlottesville, Va.	
W. G. Muncy	Charlottesville, Va.	

C. The names and titles of principal general officers are:

Name	Title
S. A. Jessup	Chairman of Board
C. A. Jessup	President & General Manager
P. S. Jessup	Vice President
W. G. Muncy	Secretary & Assistant Treasurer
J. L. Jessup	Treasurer
B. A. Reynolds	Assistant Secretary
R. A. Trice	Assistant Secretary
J. E. Craft	Vice President

13. List of companies under common control with respondent

Line No.			
1	Charlottesville & Albemarle Bus Co.	Charlottesville Va.	Joint Management
2	Trailways Service Inc.	Washington D. C.	Joint Management
3	Safeway Transit Co.	Wilmington N. C.	Joint Management
4	Lynchburg Transit Co.	Lynchburg Va.	Joint Management
5	Safety Motor Transit Co.	Roanoke Va.	Joint Management
6	Safeway Trails Inc.	Washington D. C.	Joint Management
7	Allentown & Reading Transit Co.	Allentown Pa.	Joint Management
8	Trailways Bus Terminal Inc.	Richmond Va.	Joint Facility
9	Va. Pepsi Cola Bottling Co. Inc.	Charlottesville Va.	Joint Management
10	Trailways Terminal of Washington Inc.	Washington D. C.	Joint Facility
11	Trailways of New England	Washington D. C.	Joint Management
12			

14. Furnish complete list showing all companies controlled by respondent, either directly or indirectly. List under each directly controlled company the companies controlled by it and under each such company any others of more remote control. Each step of control should be appropriately indented from the left margin. After each company state the percentage, if any, of the voting power represented by securities owned by the immediately controlling company.

Line No.		
21	Allentown & Reading Transit Co. Allentown Pa.	100% Stock Ownership
22		
23	Trailways Service Inc., Washington D. C.	50% Stock Ownership
24	Joint Garage Facility Respondent & Safeway Trails, Inc. Washington D. C.	
25		
26	Trailways Bus Terminal, Inc., Richmond Va.	50% Stock Ownership
27	Joint Terminal Facility Respondent & Carolina Coach Co. Raleigh N. C.	
28		
29	Safeway Trails, Inc., Washington D. C.	Ownership of 355 shares of total of
30		1500 shares outstanding
31	Trailways Terminal of Washington D. C.	50% Stock Ownership
32	Joint Terminal Facility Respondent & Safeway Trails, Inc., Washington D. C.	
33		
34	Safeway Transit Co., Wilmington N. C.	100% Stock Ownership
35	Trailways of New England	50% Stock Ownership
36	Safety Motor Transit Co., Roanoke Va.	100% Stock Ownership
37	Valley Trailways, Inc.	50% Stock Ownership
38	Lynchburg Transit Co., Lynchburg Va.	100% Stock Ownership
39	Service Coach Line, Inc., Tampa Florida (ICC Docket M MCF 61087)	33 1/3% Stock Ownership
40	Blue Ribbon Lines, Corp., Ashland, Kentucky	100% Stock Ownership
41		
42		

15. Furnish complete list showing companies controlling the respondent. Commence with the company which is most remote and list under each such company the company immediately controlled by it. Each step of control should be appropriately indented from the left margin. After each company state the percentage, if any, of the voting power represented by securities owned by the immediately controlling company. Where any company listed is immediately controlled by or through two or more companies jointly, list all such companies and list the controlled company under each of them, indicating its status by appropriate cross references.

Line No	
51	None
52	
53	
54	
55	
56	
57	
58	
59	
60	

Schedule 9009.—CONTRACTS AND AGREEMENTS—ASSOCIATED COMPANIES

1. Furnish the information called for in item 9 concerning each contract agreement or arrangement (written or unwritten) in effect at any time during the year between the respondent and companies or persons associated with the respondent, including officers, directors, stockholders, owners, partners or their wives and other close relatives, or their agents, whereby the respondent received management, construction, engineering, financial, legal, accounting, purchasing or other type of service including the furnishing of materials and supplies, purchase of equipment and the leasing of structures, land, and vehicles.

2. The basis for computing payments such as rental charges, commissions, taxes, maintenance costs, charges for improvements, etc., should be fully stated in the case of each such contract, agreement or arrangement.

3. The total amount paid by the respondent during the year under the terms of each contract, agreement, etc., should be stated.

4. If motor fuel is furnished the respondent, the price per gallon should be shown.

5. In connection with the repairing and servicing of the respondent's equipment, and the furnishing of other materials and supplies, the mark-up of labor and materials should be stated.

6. Information to be reported in this schedule shall be furnished for each company or individual to whom the respondent paid $2,000 or more during the year covered by the report.

7. Do not include information shown in schedule 9009-A.

8. If the respondent did not participate in any such contract or arrangement, that fact should be stated.

9. (a) Name of company or person rendering service.
   (b) If associate is other than a principally-owned subsidiary of respondent such as a company controlled by persons associated with respondent, furnish names of partners, owners, or stockholders of associate and their proportionate interest in associate.
   (c) Character of service.
   (d) Basis of charges.
   (e) Date and term of contract.
   (f) Date of Commission authorization, if contract has received Commission approval.
   (g) Total charges for year, classified as to purchases, compensation for service, and reimbursement for expenses.

Line No.	
1	(a) Trailways Service, Inc., Washington, D. C.
2	(c) Maintenance & Service to Revenue Equipment
3	(d) Cost of actual work done plus fixed percentage overside on labor, materials and
4	supplies furnished to cover overhead.
5	(e) September 1947 with cancellation by either party
6	(f) None
7	(g) Not available
8	
9	Safeway Trails, Inc. has leased space in New York Port of Authority Bus Terminal
10	in connection with Virginia Stage Lines, Inc. and others have a working agreement
11	for cooperative advertising and Sales Promotion in the New York area.
12	
13	
14	
15	Respondent owns 50% Stock of Trailways Bus Terminal, Inc. which is operated as a
16	joint Terminal facility in Richmond, Virginia with Carolina Coach Company.
17	
18	

Safeway Trails, Inc. has leased space in New York Port of Authority Bus Terminal in connection with Virginia Stage Lines, Inc. and others have a working agreement for cooperative advertising and Sales Promotion in the New York area.

Respondent owns 50% Stock of Trailways Bus Terminal, Inc. which is operated as a joint Terminal facility in Richmond, Virginia with Carolina Coach Company.

Respondent owns 50% of Stock of Trailways Terminal of Washington, Inc. Washington, D. C. which is operated as a joint facility with Safeway Trails, Inc.

Respondent also has working arrangements with various other carriers for "Pooled Equipment" between various points on an exchange equipment basis. The contract contemplates balancing out mileage by even mileage on exchange of equipment.

Motor Carrier—Form D

561431 O - 60 (Face p. 28) No. 3

Interstate Commerce Commission

Washington 25, D. C.

I, HAROLD D. McCOY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is a true copy of the Title page and pages 3 and 50 taken from the annual report of Virginia Stage Lines, Inc., for the year ended December 31, 1959, the original of which now on file in this Commission, in my custody as Secretary of said Commission.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Commission this 8th day of August, A. D. 1960.

Harold D. McCoy

SECRETARY OF THE INTERSTATE COMMERCE COMMISSION

Supreme Court of the United States

October Term, 1960

No. 7

BRUCE BOYNTON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

On Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

A. S. HARRISON, JR.
Attorney General of Virginia

R. D. McILWAINE, III
Assistant Attorney General

WALTER E. ROGERS
Special Assistant

Supreme Court–State Library Building
Richmond 19, Virginia

TABLE OF CONTENTS

	Page
PRIOR PROCEEDINGS	1
STATEMENT OF FACTS	2
THE STATUTE	4
QUESTIONS PRESENTED	5
ARGUMENT	5
I. The Virginia Statute and the Interstate Commerce Clause	5
II. The Virginia Statute and the Fourteenth Amendment	19
CONCLUSION	31

TABLE OF CITATIONS

Cases

A. F. L. v. American Sash & Door Co., 335 U. S. 538	16
Barrows v. Jackson, 346 U. S. 249	30
Bibb v. Navajo Freight Lines, 359 U. S. 520	13, 15
Breard v. Alexandria, 341 U. S. 622	31
Civil Rights Cases, 109 U. S. 3	19, 20, 25, 28
Hall v. Virginia, 188 Va. 72	31
Huron Cement Co. v. City of Detroit, ... U. S. ....., 80 S. Ct. 813, decided April 25, 1960	16
Keys v. Carolina Coach Co., 64 M. C. C. 769	6
Marsh v. Alabama, 326 U. S. 501	31
McCabe v. Atchison T. & S. F. Ry., 235 U. S. 151	24
Mitchell v. United States, 313 U. S. 80	24
Morgan v. Virginia, 328 U. S. 373	12, 13, 15

Page

N.A.A.C.P. v. St. Louis, San Francisco Railway Co., 297 I. C. C. 335 ..... 6, 8

Shelley v. Kraemer, 334 U. S. 1 ..... 19, 30

Slack v. Atlantic White Tower System, 181 F. Supp. 124 23

Southern Pacific Co. v. Arizona, 325 U. S. 761 ..... 9, 13, 15

State v. Clyburn, 247 N. C. 455, 101 S. E. 2d 295 20

United States v. Cruickshank, 92 U. S. 542 19

United States v. Harris, 106 U. S. 629 ..... 19, 20

Williams v. Howard Johnson's Restaurant, 4 Cir., 268 F. (2d) 845 ..... 16, 24

Wilmington Parking Authority v. Burton, 157 A. 2d 894 23

Other Authorities

Acts of Assembly (1934), Chapter 165, p. 248 5

Code of Virginia (1950), Section 18-225 ..... 4, 5

Interstate Commerce Act, Section 303(a)(19) 7

49 U.S.C.A. 3(1) 6

49 U.S.C.A. 316(d) 6

Supreme Court of the United States

October Term, 1960

No. 7

BRUCE BOYNTON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

On Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

PRIOR PROCEEDINGS

On January 6, 1959, petitioner was convicted in the Police Court of the City of Richmond, Virginia, for violation of Section 18-225 of the Code of Virginia (1950) as amended, and a fine of ten dollars and costs was imposed. Upon appeal to the Hustings Court of the City of Richmond, petitioner was again convicted on February 20, 1959, and the same punishment imposed. A petition for a writ of error to the judgment of the Hustings Court was denied by the Supreme Court of Appeals of Virginia on June 19, 1959, and the cause is currently before this Court on a writ of certiorari to the Supreme Court of Appeals of Virginia, which was granted by this Court on February 23, 1960.

STATEMENT OF FACTS

On the night of December 20, 1958, the petitioner, a Negro student at the Howard University School of Law, was traveling via "Trailways" bus from Washington, D. C., to his home in Selma, Alabama. He boarded the bus in Washington, D. C., at 8:00 P. M., and arrived in Richmond, Virginia, about 10:40 P. M. Upon being informed by the driver of the bus that there would be a stopover of some forty minutes in Richmond, petitioner left the bus and entered the bus terminal building located at Ninth and Broad Streets in the City of Richmond (R. 27-28). Although noticing therein a separate restaurant for colored patrons which had seating capacity available (R. 28, 22), petitioner entered the restaurant for white patrons, seated himself at a counter and requested service. He was advised —first by a waitress and then by the assistant manager of the restaurant—that separate facilities were maintained for persons of the Negro race and that he could be served in the restaurant reserved for colored patrons. Petitioner stated that he was an interstate passenger and was entitled to be served where he was. The assistant manager requested him to leave the premises and repair to the other restaurant. When petitioner refused to comply with this request, he was arrested, upon a warrant issued at the instance of the assistant manager, for trespass in violation of Section 18-225 of the Virginia Code (R. 20, 21, 30).

The bus terminal building in Richmond, Virginia, is owned by Trailways Bus Terminal, Inc., which company leases space therein to Bus Terminal Restaurant of Richmond, Inc. The lease in question grants Bus Terminal Restaurant of Richmond, Inc., exclusive authority to operate restaurant facilities in the terminal (R. 9-18), and separate facilities for white and colored patrons are maintained by

the lessee company (R. 20). The Record discloses that Bus Terminal Restaurant of Richmond, Inc., is "not affiliated in any way with the bus company", and that the bus company has "no control over the operation of the restaurant" (R. 20). Moreover, the restaurant facilities are "not necessarily" operated for bus passengers and have "quite a bit of business . . . from local people" (R. 23).

Counsel for the Commonwealth find it necessary to comment upon the statement contained in the petitioner's brief and that contained in the brief *amicus curiae* filed by the Solicitor General on behalf of the United States. In the former, it is stated that petitioner first looked into a small restaurant and noticed "that it was crowded" (Brief, p. 3). In the brief of the Solicitor General, it is stated that the restaurant reserved for colored people "appeared to be crowded" (Brief, p. 2). While the petitioner testified that the restaurant reserved for colored patrons "appeared to be crowded" and that he informed the witness that it was "a bit" crowded, the witness Rush, assistant manager of the restaurant, testified that the facility in question was not crowded (R. 22). Neither the petitioner's brief nor that of the Solicitor General contains any reference to this positive testimony which, in the present posture of this litigation, must be accepted as establishing the fact of the case.

If the condition—whether crowded or uncrowded—of the restaurant reserved for colored people is immaterial, reference to such condition is unnecessary. If material, this Court should not be given the impression that the facts were favorable to the petitioner's view of the case in an attempt to show an alleged inconvenience to an interstate traveler which did not exist. On the contrary, an examination of his evidence establishes that the petitioner's complaint is not that he was denied an opportunity to secure food or was

inconvenienced in so doing, but that he was denied the opportunity to eat in a racially non-segregated facility in violation of his alleged constitutional right as an interstate traveler.

Moreover, while counsel for the petitioner and the Solicitor General have gone to great lengths to present to this Court evidence concerning the inter-corporate relationship between certain operating bus companies and Trailways Bus Terminal, Inc.—evidence which was not presented to nor considered by any judicial tribunal of the Commonwealth of Virginia—both have failed to mention, either in their factual statement or elsewhere in their briefs, evidence which is properly in the record (1) that there was no affiliation in any way between the bus company and the restaurant company here involved and (2) that the bus company had no control over the operation of the restaurant, which is maintained for local clientele as well as persons who may be passengers on buses using the terminal in which the restaurant facilities are located.

THE STATUTE

Under attack in the instant case is Section 18-225 of the Code of Virginia (1950) as amended, which in pertinent part provides:

> "If any person shall without authority of law go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge of such land, or after having been forbidden to do so by sign or signs posted on the premises at a place or places where they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars or by confinement in jail not exceeding thirty days, or by both such fine and imprisonment."

QUESTIONS PRESENTED

1. Does Section 18-225 of the Virginia Code, as applied to petitioner in the case at bar, contravene Article I, Section 8, Clause 3, of the Constitution of the United States?

2. Does Section 18-225 of the Virginia Code, as applied to the petitioner in the case at bar, contravene the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

I.

The Virginia Statute and the Interstate Commerce Clause

Section 18-225 of the Virginia Code first appeared as Chapter 165 of the Acts of the General Assembly of 1934. Acts of Assembly (1934), Chapter 165, p. 248. With minor amendments not here material, the language of the existing statute is substantially identical to that contained in the original enactment. As is manifest from its terms, the statute does no more than impose criminal sanctions for continued trespass by an individual upon the lands or premises of another after proper warning and is entirely devoid of any racial connotation whatever. The statute does not purport to be, and is not, a racial segregation law.* It forbids trespass by anyone—whether he be a member of a racial minority or not—in going upon or remaining upon the private property of another when he is not welcome. Such con-

*Indeed, those familiar with the legislative history of the statute are aware that the provision concerning signs was inserted to combat the problems presented by unauthorized use of unattended, private parking lots. In this connection, petitioner's discussion of the early statutes and common law of Virginia relating to trespass upon private property, and his compilation of the statutes of other States, England, the Commonwealth countries and South Africa (to show where the petitioner would and would not have been convicted of an offense under the circumstances of this case) are of no assistance in resolving the issues presented in the instant litigation.

duct in violation of individual property rights is a proper subject of State legislation.

Counsel for the Commonwealth respectfully submit that invocation of this statute by an agent of Bus Terminal Restaurant of Richmond, Inc., in the case at bar, entails no conflict with the Interstate Commerce Act or the Commerce Clause of the United States Constitution. With respect to the Interstate Commerce Act, 49 U. S. C. A. 1 et seq., the provisions of Sections 3(1) and 316(d) thereof make it unlawful for any common carrier by railroad or motor vehicle to make or give any undue or unreasonable preference or advantage to any person, or to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect.* However, the maintenance of racially separate restaurant facilities in a terminal building by a lessee non-carrier concern is not antagonistic to these provisions of the Interstate Commerce Act. The validity of this proposition was definitely established in *N.A.A.C.P.* v. *St. Louis—San Francisco Railway Co.*, 297 I. C. C. 335, in which case the Interstate Commerce Commission ruled that the maintenance of segregated lunch rooms located in a railroad passenger station in Richmond, Virginia, by a lessee of the Richmond Terminal Railway Company was not violative of Section 3(1) of the Act. Subsequently, in *Keys* v. *Carolina Coach Co.*, 64 M. C. C. 769, the Commission ruled that Section 316(d) of the Interstate Commerce Act imposed upon common carriers by motor vehicle restrictions similar to those imposed by Section 3(1) upon railroad carriers.

The decision of the Interstate Commerce Commission in *N.A.A.C.P.* v. *St. Louis—San Francisco Railway Company*,

*49 U.S.C.A. 3(1); 49 U.S.C.A. 316(d); post, Appendix A.

supra, is utterly at variance with the contention of the petitioner in the case at bar that the operation of racially separate restaurant facilities by Bus Terminal Restaurant of Richmond, Inc., is repugnant to the Interstate Commerce Act. Indeed, in that case it was established—in contrast to the want of similar proof in the case at bar—that the defendant corporation, Richmond Terminal Railway Company, which operated the terminal and leased the lunch room facilities to the Union News Company, was jointly controlled by the Richmond, Fredericksburg and Potomac and the Atlantic Coast Line railroad companies and was a carrier subject to the jurisdiction of the Commission.

In an effort to avoid the conclusive effect of that decision, counsel for the petitioner and the Solicitor General seek to introduce new evidence in the instant case, at the ultimate level of judicial review, to establish that Trailways Bus Terminal, Inc.—the company which owned the terminal building in question and leased space therein to Bus Terminal Restaurant of Richmond, Inc.—is jointly owned by two operating bus companies, Carolina Coach Company and Virginia Stage Lines, whose names do not even appear in the record. In this manner they seek to invoke the provisions of Section 303(a)(19) of the Interstate Commerce Act, which prescribes:

> "The 'services' and 'transportation' to which this chapter applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith."

The evidence offered by counsel for the petitioner is set forth in documents of which the Supreme Court of Appeals of Virginia may not take judicial notice. The evidence of the Solicitor General is offered to this Court, for the first time in this case, by one who is not even a party to the litigation. *Counsel for the Commonwealth insist that such evidence is not properly before this Court and may not properly be considered by this Court.*

Even if it were appropriate for this Court to consider it, the challenged evidence would not establish that the restaurant facilities under consideration in this case were "operated or controlled" by a motor vehicle carrier. At most, such evidence would only establish that the terminal itself was so operated or controlled, and the record discloses that there was no enforced racial segregation—by law or otherwise—in any of the facilities of the terminal, as distinguished from the restaurant located in the same building

The space utilized for the restaurant facilities was leased to an independent corporation which was in no way under the control of, or affiliated with, the bus company. The written lease between Trailways Bus Terminal, Inc. and Bus Terminal Restaurant of Richmond, Inc. is a part of the record in this case and, as was said of a comparable document in *N.A.A.C.P.* v. *St. Louis—San Francisco Railway Co.*, *supra* at 343:

> "The lease is silent as to racial segregation. The Terminal has certain powers of supervision for a purpose which may be described as policing. The lessee is obligated to 'comply with the requirements of the Department of Public Health, City of Richmond, and with all other lawful governmental rules and regulations.' The context, however, indicates that this requirement is for the purpose of keeping the premises in a neat, clean and orderly condition, and does not

render the lessee liable for violations of the Interstate Commerce Act."

Significantly, counsel for the petitioner did not assert—either in their petition for writ of certiorari or in their brief—that the validity of the Virginia statute under the Interstate Commerce Act was one of the questions presented by this appeal, and they concede that Congress has expressed no specific intent concerning an arrest and conviction like that of the petitioner in the case at bar (Brief, p. 19). Moreover, counsel for the petitioner have devoted less than two pages to this point in their argument on brief. In so doing, it would appear that they have accorded this contention a consideration proportioned to its merit.

Southern Pacific Co. v. *Arizona*, 325 U. S. 761, provides an appropriate point of departure for consideration of petitioner's principal contention, *i.e.*, that invocation of the Virginia statute under the circumstances of the case at bar is repugnant to the Commerce Clause of the United States Constitution. The dominant question presented in that case was whether or not the Arizona Train Limit Law, which limited the length of railroad trains operating in Arizona to fourteen passenger and seventy freight cars, contravened the Commerce Clause. With respect to the principles governing the resolution of that question and the proper application of those principles to the case before it, this Court observed (325 U. S. at 766-771):

> "Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation. Ever since Wilson v. Black Bird Creek Marsh Co. 2 Pet (US) 245, 7 L ed 412, and Cooley v. Port Wardens, 12 How (US) 299, 13 L ed 996, it has been recognized that, in the absence of conflicting legis-

lation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interestate commerce or even, to some extent, regulate it.

* * *

"But ever since Gibbons v. Ogden, 9 Wheat. (US) 1, 6 L ed 23, the states have not been deemed to have authority *to impede substantially the free flow of commerce from state to state*, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.

* * *

"In the application of these principles some enactments may be found to be plainly within and others plainly without state power. But between these extremes lies the infinite variety of cases, in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.

* * *

"Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a matter which would otherwise not be permissible . . . or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce.

* * *

"But in general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application, doubtless because it has . . . been aware that *in their application state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed*

judgment. Terminal R. Asso. v. Brotherhood of R. Trainmen, supra (318 US 8, 87 L ed 578, 63 S Ct 420); Southern R. Co. v. King, 217 US 524, 54 L ed 868, 30 S Ct 594. Meanwhile, Congress has accomodated its legislation as have the states, to these rules as an established feature of our constitutional system. There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, *provided it does not materially restrict the free flow of commerce across state lines, or intefere with it in matters with respect to which uniformity of regulation is of predominant national concern.*

"*Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation* of interstate trains, adopted as a safety measure, *imposes on interstate commerce,* and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, such as to make inapplicable the rule generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference." (Italics supplied)

Consistent with the principles thus enunciated, this Court proceeded to consider and evaluate the "relevant factual material" which afforded "a sure basis" for its "informed judgment" that the Arizona statute *in fact* imposed an undue burden upon interstate commerce. This material consumed some 3000 pages of the printed record before the Court in that case, and in its opinion, this Court repeatedly referred to the "evidence", the "statistics introduced into the record" and the "detailed findings" which the record amply supported. Id. at 775-778. Only after a full analysis of the

record evidence did this Court conclude that the statute under consideration infringed the Commerce Clause.

In *Morgan* v. *Virginia*, 328 U. S. 373, the question presented was whether or not a statute of Virginia requiring racial separation of passengers on buses operated by intrastate and interstate motor vehicle carriers was antagonistic to the Commerce Clause. Invalidating the statute there under consideration, this Court stated (328 U. S. at 377-381):

> "There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it *unduly burdens* that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation. Too true it is that the principle lacks in precision. Although the quality of such a principle is abstract, its application *to the facts of a situation created by the attempted enforcement of a statute* brings about *a specific determination*, as to whether or not the statute in question is a burden on commerce. Within the broad limits of the principle *the cases turn on their own facts.*
>
> * * *
>
> "On appellant's journey, this statute required that she sit in designated seats in Virginia. Changes in seat designation might be made 'at any time' during the journey when 'necessary or proper for the comfort and convenience of passengers.' This occurred in this instance. Upon such change of designation, the statute authorizes the operator of the vehicle to require, as he did here, 'any passenger to change his or her seat as it may be necessary or proper.' An interstate passenger must if necessary repeatedly shift seats while moving

in Virginia to meet the seating requirements of the changing passenger group. On arrival at the District of Columbia line, the appellant would have had freedom to occupy any available seat and so to the end of her journey.

"Interstate passengers traveling via motors between the north and south or the east and west may pass through Virginia on through lines in the day or in the night. The large buses approach the comfort of pullmans and have seats covenient for rest. On such interstate journeys the enforcement of the requirements for reseating would be disturbing.

* * *

"*As our previous discussion demonstrates*, the transportation difficulties arising from a statute that requires commingling of the races, as in the De Cuir Case, are increased by one that requires separation, as here." (Italics supplied)

The doctrine enunciated in these cases is not ancient history, nor are the decisions themselves judicial relics of some lost civilization. The opinion of this Court in *Bibb* v. *Navajo Freight Lines*, 359 U. S. 520, decided May 25, 1959, convincingly demonstrates that the principles under consideration have not been enervated by the passage of time and that they apply with undiminished vitality to present day litigation. Indeed, counsel for the petitioner concede that "the vigor of the *Morgan* and *Southern Pacific* cases was reaffirmed" by this Court's decision in the *Bibb* case.

Under consideration in that case was the question of whether or not an Illinois statute requiring a certain type of rear fender mudguard on trucks and trailers operating on the highways of that State conflicted with the Commerce Clause. Sustaining the decision of a specially con-

stituted three-judge District Court declaring the Illinois statute violative of the Commerce Clause, this Court declared (359 U. S. at 524):

> "Unless we can *conclude on the whole record* that 'the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it' (Southern P. Co. v. Arizona, supra (325 U.S. pp. 775, 776)) we must uphold the statute." (Italics supplied)

The Court then proceeded to a consideration of the exhaustive findings of the trial court relating to the cost, safety, time loss and interference with the "interline" operations of motor carriers occasioned by an interstate carrier's compliance with the challenged statute. At the conclusion of its review, the Court pointed out (359 U. S. at 528):

> *"This in summary is the rather massive showing of burden on interstate commerce which appellees made at the hearing."* (Italics supplied)

Mr. Justice Harlan, with whom Mr. Justice Stewart joined, authored a separate concurring opinion which is sufficiently brief, and sufficiently significant to merit full reproduction in the body of this brief (359 U. S. at 530).

> "The opinion of the Court *clearly demonstrates the heavy burden* in terms of cost and interference with 'interlining,' which the Illinois statute here involved imposes on interstate commerce. *In view of the findings of the District Court, summarized on page 5 of the Court's opinion and fully justified by the record,* to the effect that the contour mudflap 'possesses no advantages' in terms of safety over the conventional flap

permitted in all other States, and indeed creates certain safety hazards, this heavy burden cannot be justified on the theory that the Illinois statute is a necessary, appropriate, or helpful local safety measure. Accordingly, I concure in the judgment of the Court." (Italics supplied)

The opinions of this Court in the *Southern Pacific*, *Morgan* and *Bibb* cases bring into bold relief the patent inadequacy of the instant record to present to this Court any substantial question of conflict between the Virginia statute and the Commerce Clause. The entire appellate record in the case at bar is less than thirty-five pages in length, and the transcribed evidence relates exclusively to the circumstances under which the petitioner was charged with violating the Virginia statute forbidding trespass to private property. Not a single item of evidence has been presented by the petitioner which even purports to establish that the regulation of the lessee non-carrier restaurant company and the Virginia statute under consideration in the instant case "materially restrict the free flow of commerce" across state lines; nor has any evidence been presented which even remotely tends to demonstrate "the nature and extent of the burden", if any, which the regulation and statute impose on interstate commerce. *Southern Pacific Co.* v. *Arizona*, *supra* at 770. In light of the decisions discussed above, it is manifest that a claim of repugnance to the Commerce Clause of the United States Constitution cannot be supported by mere speculation and conjecture and that the regulation of the restaurant company and the State statute challenged here cannot be held invalid in the absence of a clear showing that they constitute an interference with interstate commerce. In this situation, it is essential that there be record evidence upon which this Court may ground

a conclusion that the regulation and statute unduly burden interstate commerce. Since the record in this case is devoid of any evidence tending to establish this proposition, the critical issue in this case is highlighted by an eventuary vacuum, and an appropriate case for judicial intervention has not been made out.

It is obvious that this Court cannot "find" or "conclude", or "demonstrate" *on the basis of the record* in the instant case that the statute and regulation here under attack have even the remotest peripheral effect upon interstate commerce, much less that they impermissibly burden such commerce. Moreover, it is no part of the judicial function for courts to be ingenious in searching out grounds upon which state or federal legislation may be invalidated. On the contrary, as this Court recently iterated in a similar context, to indulge such a view "would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Huron Cement Co.* v. *City of Detroit*, ... U. S. ....., 80 S. Ct. 813, decided April 25, 1960.

Invalidation of the legislation under attack in the instant case upon the ground that, in its operation, it unduly burdens interstate commerce, would manifestly subvert the judicial principles enunciated by Mr. Justice Frankfurter in his concurring opinion in *American Fed. of Labor* v. *American Sash & Door Co.*, 335 U. S. 538, 555-557:

> "In the day-to-day working of our democracy it is vital that the power of the non-democratic organ of our Government be exercised with rigorous self-restraint. Because the powers exercised by this Court are inherently oligarchic, Jefferson all of his life thought of the Court as 'an irresponsible body' and 'independent of the nation itself'. The Court is not saved from being oligarchic because it professes to act in the service of

humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace. * * *

"Our right to pass on the validity of legislation is now too much a part of our constitutional system to be brought into question. But the implications of that right and the conditions for its exercise must constantly be kept in mind and vigorously observed. Because the Court is without power to shape measures for dealing with the problems of society but has merely the power of negation over measures shaped by others, the indispensable judicial requisite is intellectual humility, and such humility presupposes complete disinterestedness. And so, in the end, it is right that the Court should be indifferent to public temper and popular wishes. * * * A court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will. Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable. Matters of policy, however, are by definition matters which demand the resolution of conflicts of value; and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people. Its functions can be assumed by this Court only in disregard of the historic limits of the Constitution."

Finally, counsel for respondent submit that none of the decisions cited by petitioner is applicable to the situation which obtains in the instant case. These decisions were also relied upon in *Williams* v. *Howard Johnson's Restaurant*,

4 Cir., 268 F. 2d 845, in which case the petitioner contended that his exclusion from the Howard Johnson's Restaurant in the City of Alexandria, Virginia, on racial grounds amounted to discrimination against a person moving in interstate commerce and also interference with the free flow of commerce in violation of the Constitution of the United States. With respect to these decisions, the United States Court of Appeals for the Fourth Circuit declared (268 F. 2d at 848):

> "The cases upon which the plaintiff relies in each instance disclosed discriminatory action against persons of the colored race *by carriers engaged in the transportation of passengers in interstate commerce*. In some instances the carrier's action was taken in accordance with its own regulations, which were declared illegal as a violation of paragraph 1, section 3 of the Interstate Commerce Act, 49 U.S.C.A. Sec. 3(1), which forbids a carrier to subject any person to undue or unreasonable prejudice or disadvantage in any respect, as in Mitchell v. United States, 313 U.S. 80, 61 S. Ct. 873, 85 L. Ed. 1201, and Henderson v. United States, 339 U. S. 816, 70 S. Ct. 843, 94 L. Ed. 1302. In other instances, the carrier's action was taken in accordance with a state statute or state custom requiring the segregation of the races by public carriers and was declared unlawful as creating an undue burden on interstate commerce in violation of the commerce clause of the Constitution, as in Morgan v. Com. of Virginia, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317; Williams v. Carolina Coach Co., D. C. Va., 141 F. Supp. 329, affirmed 4 Cir., 207 F. 2d 408; Flemming v. S. C. Elec. & Gas Co., 4 Cir., 224 F. 2d 752; and Chance v. Lambeth, 4 Cir., 186 F. 2d 879.
>
> "*In every instance the conduct condemned was that of an organization directly engaged in interstate* commerce and the line of authority would be persuasive in

the determination of the present controversy *if it could be said that the defendant restaurant was so engaged.* We think, however, that the cases cited are not applicable because we do not find that a restaurant is engaged in interstate commerce *merely because in the course of its business of furnishing accommodations to the general public it serves persons who are traveling from state to state.* As an instrument of local commerce, the restaurant is not subject to the constitutional and statutory provisions discussed above and, thus, is at liberty to deal with such persons as it may select." (Italics supplied)

II.

The Virginia Statute and the Fourteenth Amendment

The petitioner's contention that his arrest and conviction for trespass violates Fourteenth Amendment rights is worthy of little consideration.

Shelley v. *Kraemer*, 334 U. S. 1, expressly held that the Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful. The Court pointed out that since the decision of this Court in the *Civil Rights Cases*, 109 U. S. 3, the principle has become firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may be fairly said to be that of the States.

In *United States* v. *Harris*, 106 U. S. 629, this Court, quoting from *United States* v. *Cruickshank*, 92 U. S. 542, said:

> "'The fourteenth amendment prohibits a state from depriving any person of life, liberty or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen as against

another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, and no more. The power of the national government is limited to this guaranty."

If the restaurant involved in this case is not subject to regulation by Congress under its power to regulate interstate commerce, the company operating it is free to select its patrons upon any basis it sees fit, and, in the case at bar, was within its rights in directing the petitioner to leave the section of the restaurant reserved for white patrons.

In the last two years, five decisions—one by the Supreme Court of North Carolina, one by the Supreme Court of Delaware, one by the United States Court of Appeals for the Fourth circuit, one by the United States District Court for the Eastern District of Maryland, and the other, this case, from the Supreme Court of Appeals of Virginia, have all sustained the right of the operator of a private restaurant to discriminate on the basis of race as against the contention that such action was proscribed by the Fourteenth Amendment. There has been no decision to the contrary, State or Federal, so far as we are aware, and none has been cited here.

In *State* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295, decided in 1958, a trespass conviction similar to that involved in this case, was upheld. The Court, after citing and quoting from the *Civil Rights Cases*, *supra*, and *U. S.* v. *Harris*, *supra*, said:

"More than half a century after these cases were decided the Supreme Court of the United States said in *Shelley* v. *Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 842, 92 L. Ed. 1161, 3 A.L.R. 2d 441: 'Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' This interpretation has not been modified: *Collins* v. *Hardyman*, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1253; *District of Columbia* v. *Thompson Co.*, 346 U. S. 100, 73 S. Ct. 1007, 97 L. Ed. 1480; *Williams* v. *Yellow Cab Co.*, 3 Cir., 200 F. 2d 302, certiorari denied *Darjan* v. *Yellow Cab Co.*, 346 U. S. 840, 74 S. Ct. 52, 98 L. Ed. 361.

"*Dorsey* v. *Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541, 14 A.L.R. 2d 133, presented the right of a corporation, organized under the New York law to provide low cost housing, to select its tenants, with the right to reject on account of race, color, or religion. The New York Court of Appeals affirmed the right of the corporation to select its tenants. The Supreme Court of the United States denied certiorari, 339 U. S. 981, 70 S. Ct. 1019, 94 L. Ed. 1385.

"The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation [Citing cases]. The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants." 101 S. E. 2d 295, 299.

In *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, decided in 1959, Judge Soper, in speaking for the

Fourth Circuit Court of Appeals, held that a restaurant, as an instrument of local commerce is not subject to the provisions of the Fourteenth Amendment, notwithstanding the substantial inconvenience and embarrassment to which persons of the Negro race may be subject in the denial to them of the right to be served in public restaurants. Judge Soper observed in his opinion:

> "The plaintiff concedes that no statute of Virginia requires the exclusion of Negroes from public restaurants and hence it would seem that he does not rely upon the provisions of the Fourteenth Amendment which prohibit the States from making or enforcing any *law* abridging the privileges and immunities of citizens of the United States or denying to any person the equal protection of the law. He points, however, to statutes of the State which require the segregation of the races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage; he emphasises the long established local custom of excluding Negroes from public restaurants and he contends that the acquiescence of the State in these practices amounts to discriminatory State action which falls within the condemnation of the Constitution. The essence of the argument is that the State licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities.
>
> "This argument fails to observe the *important distinction between activities that are required by the State and those which are carried out by voluntary choice and without compulsion by the people of the State in accordance with their own desires and social practices. Unlike these actions are performed in obedience to some positive provision of State law they do not furnish a basis for the pending complaint.* The license laws of Virginia do not fill the void Section 35-26 of the Code of Virginia, 1950, makes it

unlawful for any person to operate a restaurant in the State without an unrevoked permit from the Commissioner, who is the chief executive officer of the State Board of Health. The statute is obviously designed to protect the health of the community but it does not authorize State officials to control the management of the business or to dictate what persons shall be served. The customs of the people of a State do not constitute State action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in *Shelley* v. *Kraemer*, 334 U. S. 1; 68 S. Ct. 836, 842:

> "Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, * * * the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment *is only such action as may fairly be said to be that of the States.* That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." (Italics supplied)

See, also, *Wilmington Parking Authority* v. *Burton*, 157 A. 2d 894, decided in January, 1960, and *Slack* v. *Atlantic White Tower System*, 181 F. Supp. 124, decided in February, 1960.

Counsel for the petitioner nowhere asserts that there exists any independent "right" to equal treatment in the use of a privately owned place of public accommodation which cannot be denied by the owner on the ground of race or color. The Solicitor General in several instances uses passages in his brief referring to such a "right," though in most instances he is careful to add qualifying phrases, such as, "as in this case, interstate transportation facilities."

We have shown above that the restaurant here involved

is not such a facility that has been subject to regulation by Congress under the commerce clause.

In the absence of a state law forbidding discrimination, such as has been enacted in a number of states, whence comes such "right" to equal treatment in the use of places of public accommodation? If it be a "right," it is something that the petitioner could assert against any who would deny it to him. If it is not something that he can assert against anyone, or any entity—public or private—then it is not a "right"; that is to say, it is not something to which he is entitled.

While it may be that the state itself could not deny to the petitioner the equal opportunity to use a place of public accommodation, or deny him equal protection in the exercise of such an opportunity if it be afforded to him by the private owner, we have yet to be informed from whence the petitioner has secured any "right" to use such accommodation as against the wishes of the owner of the establishment.

The cases cited by the petitioner, and *Mitchell* v. *United States*, 313 U. S. 80 and *McCabe* v. *Atchison T. & S. F. Ry.*, 235 U. S. 151, cited by the Solicitor General, were, as Judge Soper said of the cases cited by the plaintiff in *Williams* v. *Howard Johnson's Restaurant*, all cases dealing with facilities of carriers actually engaged in interstate commerce.

The Solicitor General has, in the brief *amicus curiae*, so intertwined cases dealing with interstate commerce, cases dealing with state-owned or operated facilities, and cases dealing with state statutes which in themselves impose discriminations, and by quotations out of context has so distorted former decisions of this Court, that we think a few comments concerning that brief are necessary.

First, after accurately paraphrasing with partial quotations two statements which this Court did make in the *Civil Rights Cases,* 109 U. S. 3, which statements were not essential to the Court's decision, the Solicitor General then improperly and incorrectly paraphrases a third statement made by this Court in those cases.

While the Court did say that "positive rights and privileges" are secured by the Fourteenth Amendment, and that that provision does nullify State action of every kind which impairs the "privileges and immunities" of citizens of the United States, (but without defining such rights, privileges or immunities), it nowhere stated that, "Racially discriminatory acts of individuals, moreover, are insulated from the proscription of the Fourteenth Amendment only insofar as they are 'unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings,' or are 'not sanctioned in some way by the State.'" Brief *amicus curiae*, page 17.

Yet the Solicitor General so implies.

The language used in the partial quotations comes from the following statement of the Court:

> "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort

to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the courts or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but, unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the state where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminatory and unjust laws of the state by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rest upon some state law or state authority for its excuse and perpetration." 109 U. S. 3, 17.

That paragraph must, of course, be read in connection with the added statement of the Court, reading as follows:

"We have discussed the question presented by the law, on the assumption that a right to enjoy equal accommodations and privileges in all inns, public conveyances and places of public amusement, is one of the essential rights of the citizen which no state can abridge or interfere with. Whether it is such a right or not, is a different question, which, in the view we have taken

of the validity of the law on the ground already stated, it is not necessary to examine." 109 U. S. 3, 19.

What the court is there saying, and all that it is saying, is that a private wrong (if any there be) in no way denies a person his constitutional rights under the Fourteenth Amendment, for it remains a private wrong, subject to redress under the law, civil or criminal, of the State where the wrong was committed. The court nowhere said, or implied, that private racially discriminatory acts were violative of or proscribed by the Fourteenth Amendment; it merely assumed for purposes of argument that the right to enjoy equal accommodations is one of the essential rights of a citizen, and held that, even if that be so, Congress had no power to legislate in that field as against the acts of private citizens. "It is State action of a particular character that is prohibited. *Individual invasion of individual rights is not the subject matter of the Amendment.*" 109 U. S. 3, 11. (Italics supplied.)

The Solicitor General, in assuming the role of friend of the court, should have been careful not to represent former language of this court as holding something it did not hold (when in fact the actual holding was to the contrary) and particularly when much of what the court was saying was based upon assumptions made *arguendo*.

Again, at page 19 of the brief *amicus curiae*, the Solicitor General says that "The right not to be excluded solely on account of race from facilities open to the public has been held to extend to such accommodations as public beaches and bathhouses [and other enumerated facilities]," citing cases. This statement, in its implications, is a complete and absolute misrepresentation—no less. In each of the situations and cases enumerated there was involved not simply a "public" but a governmentally *owned* facility. The discriminatory

action was, in truth, state action operating directly upon the individuals affected—no less.

The cases dealing with state owned facilities do *not* "illustrate" the principle so broadly stated by the Solicitor General at page 20 of his brief.

Ever since it was positively stated in the *Civil Rights Cases, supra*, it has been universally accepted by all of the courts, federal and state alike, and by this court itself that the Fourteenth Amendment created no right to be free of private discrimination in the use of privately owned and operated facilities. In fact, in that case, the court held that Congress itself, even under its power to enact legislation under Section 5 of the Fourteenth Amendment, could not enter into such a field of "municipal law regulative of all private rights between man and man in society" and enact positive legislation forbidding such discrimination. This court said that to have Congress establish such a code of municipal law "would be to make Congress take the place of the state legislatures and to supersede them."

When it is conceded that a private individual may make distinctions, that is to say may discriminate, on purely racial grounds in selecting his customers, guests, employees, etc.—and, in the absence of valid applicable federal or state statutes to the contrary, it must be so conceded—then, when he does so discriminate or make distinctions, it is made by him as an individual and is complete and over.

When the person affected by the action of another individual insists upon a contrary "right" which he does not have and then proceeds to violate the property rights admittedly possessed by such other party and insists upon remaining upon the property of the other, the discrimination complained of does not become that of the state when its simple law of trespass is applied.

Indeed, in the recent case of *Griffin* v. *Collins* (U. S. D.

C. Md.), ... F. Supp. ....., 29 Law Week 2109, decided August 25, 1960, the Court held that the arrest of Negro trespassers by Maryland police, in response to the request of an amusement park proprietor for police assistance in enforcing such park's policy of excluding Negroes, did not constitute state action in violation of the Due Process and Equal Protection clause of the Fourteenth Amendment or of the Civil Rights Act. In the course of its opinion, the Court stated:

> "Plaintiffs concede the right of the corporate defendants, as owners and operators of [amusement] park, to serve or refuse to serve whomever they please, and concede that said defendants like other property owners or operators of a private business may use 'self-help' to eject a Negro who insists on remaining on the premises after being told to leave. Counsel argue, however, that if the proprietor of a business calls a police officer, deputy sheriff, or other state official to remove or arrest the Negro, such action or arrest would (1) violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment, which forbid state-imposed racial discrimination in the field of recreational activity, and (2) deprive the Negro of his rights under 42 U.S.C.A. 1981 and 1983.
>
> "Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant, or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws. Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights."

Please note that the Virginia statute is color blind. It is concerned with only three questions:

Was the defendant on the property of another?
Was the defendant directed to leave?
Did he refuse to do so?

The legislation is not concerned with whether the defendant or the other individual was white, green, purple or black, or with whether the two parties were of the same or of different races, religions, creeds or whatever.

Nor should the policeman who makes the arrest, or the court which tries the defendant, be concerned with such facts. In truth, if justice is to be color blind, evidence of such facts would be inadmissible.

The case we have here is not such a case as *Marsh* v. *Alabama*, 326 U. S. 501, which involved what was in fact a town, a whole community. The town, a suburb of Mobile, Alabama, was owned by a corporation. Except for that, it had all the characteristics of any other American town. The property consisted of residential buildings, streets, a system of sewers, a sewage disposal plant, a business block. A deputy of the Mobile county sheriff, paid by the company, served as the town's policeman. The United States had a post office there. The town and the surrounding neighborhood were thickly populated. The surrounding neighborhood could not be distinguished from the company's property by any one not familiar with the property lines. This court there held that a person could not be punished for distributing religious literature upon the sidewalks of the town.

Nor do we have here such a case as *Shelley* v. *Kraemer*, *supra*, or *Barrows* v. *Jackson*, 346 U. S. 249, which involved the efforts of one person to control the action of a second party in his relations with still a third party, and the use by the state of its powers to compel one person who did

not wish to discriminate to carry out actual discrimination against another. Note that in those two cases this court was dealing with cases in which justice was not color blind. The state judicial proceeding complained of was predicated upon race, required evidence as to the race of the individuals involved and the orders of the court were entered solely on the grounds of the race of the individuals involved.

That this court has not applied *Marsh* v. *Alabama* and *Shelley* v. *Kraemer*, *supra*, to prohibit state judicial action not in itself concerned with racial issues, or religious issues, or issues of freedom of the press, but only with property rights (which possibly may have arisen after there has been some private discrimination by an individual) is shown by *Hall* v. *Virginia*, 188 Va. 72, App. dism. 335 U. S. 875, Rehearing denied 335 U. S. 912, and *Breard* v. *Alexandria*, 341 U. S. 622.

It is submitted that the petitioner presents no case of the violation of his rights under the Fourteenth Amendment.

CONCLUSION

For the reasons heretofore stated, counsel for the Commonwealth respectfully submit that the judgment of the Supreme Court of Appeals of Virginia should be affirmed.

Respectfully submitted,

A. S. Harrison, Jr.
Attorney General of Virginia

R. D. McIlwaine, III
Assistant Attorney General

Walter E. Rogers,
Special Assistant

Supreme Court–State Library Building
Richmond 19, Virginia

APPENDIX A

49 U.S.C.A. 3(1)

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

49 U.S.C.A. 316(d)

All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region,

district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1960.

Bruce Boynton, Petitioner, v. Virginia.	On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[December 5, 1960.]

Mr. Justice Black delivered the opinion of the Court.

The basic question presented in this case is whether an interstate bus passenger is denied a federal statutory or constitutional right when a restaurant in a bus terminal used by the carrier along its route discriminates in serving food to the passenger solely because of his color.

Petitioner, a Negro law student, bought a Trailways bus ticket from Washington, D. C., to Montgomery, Alabama. He boarded a bus at 8 p. m. which arrived at Richmond, Virginia, about 10:40 p. m. When the bus pulled up at the Richmond "Trailways Bus Terminal" the bus driver announced a forty-minute stopover there. Petitioner got off the bus and went into the bus terminal to get something to eat. In the station he found a restaurant in which one part was used to serve white people and one to serve Negroes. Disregarding this division, petitioner sat down on a stool in the white section. A waitress asked him to move over to the other section where there were "facilities" to serve colored people. Petitioner told her he was an interstate bus passenger, refused to move and ordered a sandwich and tea. The waitress then brought the Assistant Manager, who "instructed" petitioner to "leave the white portion of the restaurant and advised him he could be served in the colored portion." Upon petitioner's refusal to leave an officer was called and petitioner was arrested and later tried, convicted and fined ten dollars in the Police Justice's Court of Richmond

on a charge that he "*Unlawfully* did remain on the premises of the Bus Terminal Restaurant of Richmond, Inc., after having been forbidden to do so" by the Assistant Manager. (Emphasis supplied.) The charge was based on § 18–225 of the Code of Virginia of 1950, as amended (1958), which provides in part:

> "If any person shall *without authority of law* go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge of such land, . . . he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars or by confinement in jail not exceeding thirty days, or by both such fine and imprisonment." (Emphasis supplied.)

Petitioner appealed his conviction to the Hustings Court of Richmond, where, as in the Police Court, he admitted that he had remained in the white portion of the Terminal Restaurant although ordered not to do so. His defense in both courts was that he had a federal right as an interstate passenger of Trailways to be served without discrimination by this restaurant used by the bus carrier for the accommodation of its interstate passengers. On this basis petitioner claimed he was on the restaurant premises lawfully, not "unlawfully" as charged, and that he remained there with, not "without authority of law." His federal claim to this effect was spelled out in a motion to dismiss the warrant in Hustings Court, which was overruled both before and after the evidence was heard. Pointing out that the restaurant was an integral part of the bus service for interstate passengers such as petitioner, and asserting that refusal to serve him was a discrimination based on color, the motion to dismiss charged that application of the Virginia law to petitioner vio-

lated the Interstate Commerce Act and the Equal Protection, Due Process and Commerce Clauses of the Federal Constitution. On appeal the Virginia Supreme Court held that the conviction was "plainly right" and affirmed without opinion, thereby rejecting petitioner's assignments of error based on the same grounds of discrimination set out in his motion to dismiss in Hustings Court but not specifically charging that the discrimination violated the Interstate Commerce Act. We think, however, that the claims of discrimination previously made under the Act are sufficiently closely related to the assignments that were made to be considered within the scope of the issues presented to the State Supreme Court. We granted certiorari because of the serious federal questions raised concerning discrimination based on color. 361 U. S. 958.

The petition for certiorari we granted presented only two questions: first, whether the conviction of petitioner is invalid as a burden on commerce in violation of Art. I, § 8, Cl. 3 of the Constitution; and second, whether the conviction violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Ordinarily we limit our review to the questions presented in an application for certiorari. We think there are persuasive reasons, however, why this case should be decided, if it can, on the Interstate Commerce Act contention raised in the Virginia courts. Discrimination because of color is the core of the two broad constitutional questions presented to us by petitioner, just as it is the core of the Interstate Commerce Act question presented to the Virginia courts. Under these circumstances we think it appropriate not to reach the constitutional questions but to proceed at once to the statutory issue.

The Interstate Commerce Act, as we have said, uses language of the broadest type to bar discriminations of all kinds. *United States v. Baltimore & Ohio R. Co.*, 333 U. S. 169, 175, and cases cited. We have held that the

Act forbids railroad dining cars to discriminate in service to passengers on account of their color. *Henderson* v. *United States*, 339 U. S. 816; see also *Mitchell* v. *United States*, 313 U. S. 80, 97.

Section 216 (d) of Part II of the Interstate Commerce Act, 49 U. S. C. § 316 (d), which applies to motor carriers, provides in part:

> "It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever; or to subject any particular person . . . to any unjust discrimination or any unjust or unreasonable prejudice or disadvantage in any respect whatsoever . . . ."

So far as relevant to our problem, the provisions of § 216 (d) quoted are the same as those in § 3 (1) of the Act, 49 U. S. C. § 3 (1), except that the latter refers to railroads as defined in Part I of the Act instead of motor carriers as defined in Part II. Section 3 (1) was the basis for this Court's holding in *Henderson* v. *United States*, *supra*, that it was an "undue or unreasonable prejudice" under that section for a railroad to divide its dining car by curtains, partitions and signs in order to separate passengers according to race. The Court said that under § 3 (1) "where a dining car is available to passengers holding tickets entitling them to use it, each such passenger is equally entitled to its facilities in accordance with reasonable regulations." *Id.*, 339 U. S., at 824. The *Henderson* case largely rested on *Mitchell* v. *United States*, *supra*, which pointed out that while the railroads might not be required by law to furnish dining car facilities, yet if they did, substantial equality of treatment of persons traveling under like conditions could not be refused consistently

with § 3 (1). It is also of relevance that both cases upset Interstate Commerce Commission holdings, the Court stating in *Mitchell* that since the "discrimination shown was palpably unjust and forbidden by the Act" no room was left for administrative or expert judgment with reference to practical difficulties. *Id.*, 313 U. S., at 97.

It follows from the *Mitchell* and *Henderson* cases as a matter of course that should buses in transit decide to supply dining service, discrimination of the kind shown here would violate § 216 (d). Cf. *Williams* v. *Carolina Coach Co.*, 111 F. Supp. 329, aff'd, 207 F. 2d 408, and *Keys* v. *Carolina Coach Co.*, 64 Motor Carrier Cases 769. Although this Court has not decided whether the same result would follow from a similar discrimination in service by a restaurant in a railroad or bus terminal, we have no doubt that the reasoning underlying the *Mitchell* and *Henderson* cases would compel the same decision as to the unlawfulness of discrimination in transportation services against interstate passengers in terminals and terminal restaurants owned or operated or controlled by interstate carriers. This is true as to railroad terminals because they are expressly made carriers by § 1 (3)(a) of the Act,[1] 49 U. S. C. § 1 (3)(a), and as to bus terminals because § 203 (a)(19) of the Act, 49 U. S. C. § 303 (a)(19), specifically includes interstate transportation facilities and property operated or controlled by a motor carrier within the definition of the "services" and

[1] See *National Association for the Advancement of Colored People* v. *St. Louis-S. F. R. Co.*, 297 I. C. C. 335, 347-348, in which the Interstate Commerce Commission held that a railroad terminal discriminates in violation of § 3 (1) if it maintains waiting rooms for the exclusive use of Negroes. The Commission regarded assignment to accommodations or facilities in a railroad terminal solely on the basis of race as an implication of inherent inferiority and found it to be unreasonable.

"transportation" to which the motor carrier provisions of the Act apply.[2]

Respondent correctly points out, however, that, whatever may be the facts, the evidence in this record does not show that the bus company owns or actively operates or directly controls the bus terminal or the restaurant in it. But the fact that § 203 (a)(19) says that the protections of the motor carrier provisions of the Act extend to "include" facilities so operated or controlled by no means should be interpreted to exempt motor carriers from their statutory duty under § 216 (d) not to discriminate should they choose to provide their interstate passengers with services that are an integral part of transportation through the use of facilities they neither own, control nor operate. The protections afforded by the Act against discriminatory transportation services are not so narrowly limited. We have held that a railroad cannot escape its statutory duty to treat its shippers alike either by use of facilities it does not own or by contractual arrangement with the owner of those facilities: *United States* v. *Baltimore & Ohio R. Co., supra.* And so here, without regard to contracts, if the bus carrier has volunteered to make terminal and restaurant facilities and services available to its interstate passengers as a regular part of their transportation, and the terminal and restaurant have acquiesced and cooperated in this undertaking, the terminal and restaurant must perform these services without discriminations prohibited by the Act. In the performance of these services under such conditions the terminal and restaurant stand

---

[2] "The 'services' and 'transportation' to which this chapter applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers, and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith."

in the place of the bus company in the performance of its transportation obligations. Cf. *Derrington* v. *Plummer*, 240 F. 2d 922, 925–926, cert. denied, 353 U. S. 924. Although the courts below made no findings of fact, we think the evidence in this case shows such a relationship and situation here.

The manager of the restaurant testified that it was not affiliated in any way with the Trailways Bus Company and that the bus company had no control over the operation of the restaurant, but that while the restaurant had "quite a bit of business" from local people, it was primarily or partly for the service of the passengers on the Trailways bus. This last statement was perhaps much of an understatement, as shown by the lease agreement executed in writing and signed both by the "Trailways Bus Terminal, Inc.," as lessor, and the "Bus Terminal Restaurant of Richmond, Inc.," as lessee. The first part of the document showed that Trailways Terminal was then constructing a "bus station" with built-in facilities "for the operation of a restaurant, soda fountain and news stand." Terminal convenanted to lease this space to Restaurant for its use; to grant Restaurant the exclusive right to sell foods and other things usually sold in restaurants, news stands, soda fountains and lunch counters; to keep the terminal building in good repair and to furnish certain utilities. Restaurant on its part agreed to use its space for the sale of commodities agreed on at prices that are "just and reasonable"; to sell no commodities not usually sold or installed in a bus terminal concession without Terminal's permission; to discontinue the sale of any commodity objectionable to Terminal; to buy, maintain, and replace equipment subject to Terminal's approval in writing as to its quality; to make alterations and additions only after Terminal's written consent and approval; to make no "sales on buses operating in and out said bus station" but only "through

the windows of said buses;" to keep its employees neat and clean; to perform no terminal service other than that pertaining to the operations of its restaurant as agreed on; and that neither Restaurant nor its employees were to "sell transportation of any kind or give information pertaining to schedules, rates or transportation matters, but shall refer all such inquiries to the proper agents of" Terminal. In short, as Terminal and Restaurant agreed, "the operation of the restaurant and the said stands shall be in keeping with the character of service maintained in an up-to-date, modern bus terminal."

All of these things show that this terminal building, with its grounds, constituted one project for a single purpose, and that was to serve passengers of one or more bus companies—certainly Trailways' passengers. The restaurant area was specifically designed and built into the structure from the beginning to fill the needs of bus passengers in this "up to date, modern bus terminal." Whoever may have had technical title or immediate control of the details of the various activities in the terminal, such as waiting-room seating, furnishing of schedule information, ticket sales, and restaurant service, they were all geared to the service of bus companies and their passengers, even though local people who might happen to come into the terminal or its restaurant might also be accommodated. Thus we have a well-coordinated and smoothly functioning plan for continuous cooperative transportation services between the terminal, the restaurant and buses like Trailways that made stopovers there. All of this evidence plus Trailways' use on this occasion shows that Trailways was not utilizing the terminal and restaurant services merely on a sporadic or occasional basis. This bus terminal plainly was just as essential and necessary, and as available for that matter, to passengers and carriers like Trailways that used it, as though such carriers had legal title and complete control over all of its activ-

ities.[3] Interstate passengers have to eat, and the very terms of the lease of the built-in restaurant space in this terminal constitute a recognition of the essential need of interstate passengers to be able to get food conveniently on their journey and an undertaking by the restaurant to fulfill that need. Such passengers in transit on a paid interstate railways' journey had a right to expect that this essential transportation food service voluntarily provided for them under such circumstances would be rendered without discrimination prohibited by the Interstate Commerce Act. Under the circumstances of this case, therefore, petitioner had a federal right to remain in the white portion of the restaurant. He was there "under authority of law"—the Interstate Commerce Act—and it was error for the Supreme Court of Virginia to affirm his conviction.[4]

Because of some of the arguments made here it is necessary to say a word about what we are not deciding. We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act. We decide only this case, on its facts, where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passen-

---

[3] Cf. *Atchison, Topeka & S. F. R. Co.*, 135 I. C. C. 633, 634–635, in which the Commission held that railroad-owned hotels and restaurants used for railroad passengers and employees, and as an incident to the operation and management of the railroad, should be accorded a common-carrier classification.

[4] Because the evidence shows that this terminal restaurant was utilized as an integral part of the transportation of interstate passengers, we need not decide whether discrimination on the basis of color by a bus terminal lessee restaurant would violate § 216 (d) in the absence of such circumstances. Cf. *National Association for the Advancement of Colored People* v. *St. Louis-S. F. R. Co.*, *supra*, at 343–344.

gers. Under such circumstances, an interstate passenger need not inquire into documents of title or contractual arrangements in order to determine whether he has a right to be served without discrimination.

The judgment of the Supreme Court of Virginia is reversed and the cause is remanded to that Court for proceedings not inconsistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1960.

Bruce Boynton, Petitioner, v. Virginia.	On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[December 5, 1960.]

Mr. Justice Whittaker, with whom Mr. Justice Clark joins, dissenting.

Neither in the Supreme Court of Appeals of Virginia nor in his petition for certiorari or in his brief on the merits in this Court did petitioner challenge the judgment on the ground that it was obtained in violation of the Interstate Commerce Act. I therefore respectfully submit that, under our rules and decisions, no such question is presented or open for consideration here.[1] But even if the Court properly may proceed, as it has proceeded, to decide the case under that Act, and not at all on the constitutional grounds solely relied on by petitioner,[2] I must say, with all deference, that the facts in this record do not show that petitioner was convicted of trespass in violation of that Act.

For me, the decisive question in this case is whether petitioner had a legal right to remain in the restaurant involved after being ordered to leave it by the proprietor. If he did not have that legal right, however arising, he was guilty of trespass and, unless proscribed by some federal

[1] See our Rules 23 (1)(c) and 40 (1)(d)(1); *Lawn* v. *United States*, 355 U. S. 339, 362, n. 16, and cases cited.

[2] The only grounds relied on by petitioner in the Supreme Court of Appeals of Virginia and in his petition for certiorari and brief on the merits in this Court were that his conviction is invalid as an undue burden on interstate commerce in violation of Art. I, § 8, cl. 3, and also violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, of the United States Constitution.

law, his conviction therefor was legally adjudged under § 18–225 of the Code of Virginia.[3]

If the facts in this record could fairly be said to show that the restaurant was a facility "operated or controlled by any [motor] carrier or carriers, and used in the transportation of passengers or property in interstate or foreign commerce," § 203 (a)(19) of Part II of the Interstate Commerce Act, 49 U. S. C. § 303 (a)(19), I would agree that petitioner had a legal right to remain in and to insist on service by that restaurant and, hence, was not guilty of trespass in so remaining and insisting though in defiance of the manager's order to leave, for § 216 (d) of the Act, 49 U. S. C. § 316 (d), makes it unlawful for a motor carrier while engaged in interstate commerce "to subject any particular person . . . to any unjust discrimination," and this Court has held that any discrimination by a carrier against its interstate passenger on account of his color in the use of its dining facilities is an unjust discrimination. *Henderson* v. *United States*, 339 U. S. 816. Cf. *Mitchell* v. *United States*, 313 U. S. 80.

But I respectfully submit that those are not the facts shown by this record. As I read it, there is no evidence in this record even tending to show that the restaurant was "operated or controlled by any carrier," directly or indirectly. Instead, all of the relevant evidence, none of which was contradicted, shows that the restaurant was owned and controlled by a noncarrier who alone operated it as a local and private enterprise. The evidence was

---

[3] Section 18–225 of the Code of Virginia, in relevant part, provides:

"If any person shall without authority of law go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian, or other person lawfully in charge of such land, . . . he shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $100.00 or by confinement in jail not exceeding thirty days or by both such fine and imprisonment."

very brief, consisting only of an exhibit (a lease) and the testimony of the assistant manager of the restaurant, of a police officer and of petitioner—all, except the exhibit, being contained on 10 pages of the printed record. The lease is in the usual and common form and terms. By it, the owner of the building, Trailways Bus Terminal, Inc., a Virginia corporation, as lessor, demised to the restaurant company, Bus Terminal Restaurant of Richmond, Inc., a Virginia corporation, as lessee, certain described "space" in the lessor's bus station building in Richmond, Virginia, "for use by lessee as a restaurant, lunchroom, soda fountain and news stand," for a term of five years from December 2, 1953 (with an option in the lessee to renew, on the same terms, for an additional five-year term), at an annual rental of $30,000 (payable in equal monthly installments) plus 12% of lessee's gross receipts from the demised premises in excess of $275,000 (payable at the end of each year).[4]

There is not a word of evidence that any carrier had any interest in or control over the lessee or its restaurant. Nor is there any suggestion in the record that the lease

[4] Under other provisions of the lease, the lessee covenanted, in substance, that it would acquire and install in the leased space, at its own expense, all things, including plumbing and wiring, which may be reasonably necessary to the equipment and operation of the restaurant; to provide and pay for all gas and electric current, except for overhead lights; to keep the premises and employees neat and clean and to operate the restaurant "in keeping with the character of service maintained in an up-to-date modern bus terminal"; that it would not keep any coin-controlled machines or sell intoxicants on the demised premises nor make "any sales on buses operating in and out of said bus station"; that it would "comply with all the ordinances of the City of Richmond, and the laws of the United States and the State of Virginia in respect to the conduct of business of Lessee on the demised premises"; to take good care of the premises, and to surrender them at the end of the term in the same condition as when received "ordinary wear and tear excepted."

or the lessee's restaurant operations under it were anything other than bona fide and for a legitimate and private business purpose. Indeed, there is not a word of evidence in the record tending to show that any carrier even had any interest in or control over the lessor corporation that owned the building. In truth, the record does not even show the name of the carrier on which petitioner was traveling or identify it other than as "Trailways."[5] On the other hand, the assistant manager of the restaurant testified, without suggestion of contradiction, that "[t]he company that operates the restaurant is not affiliated in any way with the bus company," and that "[t]he bus

[5] Obviously recognizing these glaring deficiencies in the evidence, counsel for petitioner and for the Government, as *amicus curiae*, have submitted with their briefs in this Court copies of certain Annual Reports of Virginia Stage Lines, Inc. (which probably was the carrier on which petitioner was traveling), Carolina Coach Company, and of Trailways Bus Terminal, Inc. (the owner of the building and lessor of the space occupied by the lessee's restaurant), to the State Corporation Commission of Virginia, purporting to show that those companies were doing business in Virginia in 1958 and 1959, and a copy of certain pages of the Annual Report filed by Virginia State Lines, Inc., with the Interstate Commerce Commission for the year 1959, purporting to show that the capital stock of Trailways Bus Terminal, Inc., was owned in equal parts by Virginia Stage Lines, Inc., and Carolina Coach Company. But none of those documents was put in evidence nor brought to the attention of the Supreme Court of Appeals of Virginia, and it appears, as contended by Virginia, that the Virginia court could not take judicial notice of those documents. See §§ 8–264 and 8–266 of the Code of Virginia; *Commonwealth* v. *Castner*, 138 Va. 81, 121 S. E. 894; *Sisk* v. *Town of Shenandoah*, 200 Va. 277, 105 S. E. 2d 169; *Beli* v. *Hagmann*, 200 Va. 626, 107 S. E. 2d 426. In the light of these facts the proffered documents cannot be considered here. *Lawn* v. *United States*, 355 U. S. 339, 354; *Wolfe* v. *North Carolina*, 364 U. S. 177. But even if those documents could be considered here, they would not aid petitioner, for they do not purport to show that any carrier had any interest in or control over the restaurant involved or in or over Bus Terminal Restaurant of Richmond, the company that owned and operated the restaurant.

company has no control over the operation of the restaurant." There was simply no evidence to the contrary.

The Court seems to agree that "respondent correctly points out [that] . . . the evidence in this record does not show that the bus company owns or actively operates or directly controls the bus terminal or the restaurant in it." But it seems to hold, as I read its opinion, that a motor carrier's regular "use" of a restaurant, though it be "neither own[ed], control[led] nor operate[d]" by the motor carrier, makes the restaurant a facility "operated or controlled by [the motor] carrier or carriers" within the meaning of § 203 (a)(19) of the Interstate Commerce Act. I must respectfully disagree. To me, it seems rather plain that when Congress, in § 203 (a)(19), said that the " 'services' and 'transportation' " to which Part II of the Act applies shall include "all vehicles . . . together with all facilities and property operated or controlled by such carrier or carriers, and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith," it hardly meant to include a private restaurant, "neither owned, operated or controlled" by a carrier. Surely such "use" of a private restaurant by a motor carrier as results from stopping and opening its buses in front of or near a restaurant does not make the restaurant a facility "operated or controlled by" the carrier, within the meaning of § 203 (a)(19) or in any true sense. This simple, and I think obvious, principle was recognized and correctly applied by the Commission as recently as November 1955 in *N. A. A. C. P.* v. *St. Louis, S. F. R. Co.*, 297 I. C. C. 335. There, the railroad terminal or station building in Richmond, Virginia, was owned by Richmond Terminal Railway Company[6]—itself a carrier under § 3 (1) of

[6] The Richmond Terminal Railway Company was controlled jointly by two railroads—the Richmond, Fredericksburg & Potomac Railway Co. and the Atlantic Coast Line.

Part I of the Act—which had leased space in that building to Union News Company for a term of 10 years, but subject to termination at the option of either party on 90 days' notice, for use as a restaurant.[7] In rejecting the contention that the Union News Company's operation of the restaurant on a racially segregated basis violated § 3 (1) of Part I of the Act, the Commission said:

> "*Unless the operation of the lunchrooms can be found to be that of a common carrier* subject to Part I of the Act, it cannot be regulated under Section 3 (1), and we are unable so to find on the facts before us." *Id.*, at 344,

and the Commission concluded:

> "We further find that the operation *by a lessee* (*noncarrier*) of separate lunchroom facilities for white and colored persons in the railway station at Richmond, constitutes a function or service which is not within the jurisdiction of this Commission." (Emphasis added.) *Id.*, at 348.

I would agree with the Court that "if the bus carrier [had] volunteered to make . . . restaurant facilities and services available to its interstate passengers as a regular part of their transportation, and the . . . restaurant [had] acquiesced . . . in the undertaking," the restaurant would then have been bound to serve the carrier's inter-

[7] The lease involved in that case was evidently similar to the one here. Speaking of that lease, the Commission said:

"The lease is silent as to racial segregation. The terminal has certain powers of supervision for a purpose which may be described as policing. The lessee is obligated to 'comply with the requirements of the Department of Public Health, City of Richmond, and with all other lawful governmental rules and regulations.' The context, however, indicates that this requirement is for the purpose of keeping the premises in a neat, clean, and orderly condition, and does not render the lessee liable for violations of the Interstate Commerce Act." 297 I. C. C., at 343.

state passengers without discrimination. For, in that case, the restaurant would have been made a facility of the carrier, within the meaning of § 203 (a)(19), and § 216 (d) would inhibit both the carrier and the restaurant from discriminating against the carrier's interstate passengers on account of their color, or on any other account, in the use of the restaurant facilities thus provided. *Henderson v. United States, supra.* But that is not this case. As we have shown, there is no evidence in this record that the carrier on which petitioner was traveling, whatever may have been its name, had "volunteered to make . . . restaurant facilities and services available to its interstate passengers" *at this restaurant* "as a part of their transportation," or that the proprietor of this restaurant ever "acquiesced" in any such "undertaking." There is no evidence of any agreement, express or implied, between the proprietor of this restaurant and any bus carrier. Instead, the undisputed evidence is that the restaurant was not in any way affiliated with or controlled by any bus carrier. On this evidence, I am unable to find any basis to support a conclusion that this restaurant was in some way made a facility of the bus carrier, or subject to Part II of the Interstate Commerce Act.

For these reasons, I cannot agree on this record that petitioner's conviction of trespass under § 18–225 of the Code of Virginia was had in violation of the Interstate Commerce Act. Since the Court's opinion does not explore the constitutional grounds relied on by petitioner, I refrain from intimating any views on those subjects.